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SUPREME COURT OF THE UNITED STATES

October, 1982

BRYANT ELECTRIC COMPANY, Et Al. - Petitioners

VERSUS

MARY ELIZABETH KISER, Individually and
as Ancilliary Administratrix of the Estate of
Paul S. Kiser, Deceased, Individually and on
Behalf of all Other Similarly Situated as a
Class - - - - - Respondents

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT C. EWALD
WYATT, TARRANT & COMBS
2600 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235

*Counsel of Record for Petitioners and
for Reynolds Metals Company*

CHARLES S. CASSIS
MARK K. FEATHER
BROWN, TODD & HEYBURN

1600 Citizens Plaza
Louisville, Kentucky 40202

Attorneys for Bryant Electric Company

JOHN DAVID COLE
COLE, HARNED & BRODERICK

921 College Street
P. O. Box 1869
Bowling Green, Kentucky 42101

Attorneys for Southwire Company and Triangle PWC, Inc.

(Additional counsel on inside cover)

DONALD L. STEPNER
ADAMS, BROOKING & STEPNER

421 Garrard Street
Covington, Kentucky 41012

Attorneys for Columbia Cable & Wire Company

LEE O. FITCH
MILLER, SEARL & FITCH

300 Bank One Plaza
P. O. Box 950
Portsmouth, Ohio 45662

Attorneys for Hatfield Wire & Cable Company

WILLIAM V. JOHNSON
JOHNSON, CUSAK & BELL

Suite 1900
One North LaSalle Street
Chicago, Illinois 60602

Attorneys for Marmon Group

WILLIAM T. McCRACKEN
CRABBE, BROWN, JONES, POTTS & SCHMIDT

2500 One Nationwide Plaza
P. O. Box 15039
Columbus, Ohio 43215

Attorneys for General Electric Company

W. ANDREW PATTON
KOHEN & KOHEN

4500 Carew Tower
Cincinnati, Ohio 45202

Attorneys for John I. Paulding, Inc.

C. ALEX ROSE
HANDMAKER, WEBER, MEYER & ROSE

2300 Citizens Plaza
Louisville, Kentucky 40202

Attorneys for Pass & Seymour, Inc.

JACOB K. STEIN
BRUCE M. ALLMAN
PAXTON & SEASONGOOD

1700 Central Trust Tower
Cincinnati, Ohio 45202

*Attorneys for Square D Company and Slater Electric
Company, Inc.*

JAMES M. WILES
WILES, DOUCHER, TRESSLER & VAN BUREN CO., L.P.A.

300 South Second Street
Columbus, Ohio 43215

*Attorneys for Leviton Manufacturing Co. and Rhode Island
Insulated Wire Company*

I. QUESTION PRESENTED FOR REVIEW:

Whether the Court of Appeals may, consistent with principles of due process, rely upon an unidentified, unverified, anonymous letter written to a newspaper as a basis for reversing the decision of the District Court.

Petitioners contend that the Court should issue this writ to answer this question in the negative.

II. LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS:

Appellants:

MARY ELIZABETH KISER, Individually and as Ancilliary Administratrix of the Estate of Paul S. Kiser, Deceased, Individually and on Behalf of all Other Similarly Situated as a Class, and

Appellees:

*BRYANT ELECTRIC COMPANY
REYNOLDS METALS COMPANY
SOUTHWIRE COMPANY
TRIANGLE PWC, INC.
COLUMBIA CABLE & WIRE COMPANY
HATFIELD WIRE & CABLE COMPANY
MARION GROUP
GENERAL ELECTRIC COMPANY
JOHN I. PAULDING, INC.
PASS & SEYMOUR, INC.
SQUARE D COMPANY
SLATER ELECTRIC COMPANY, INC.
LEVITON MANUFACTURING CO.
RHODE ISLAND INSULATED WIRE COMPANY

*List of parent, subsidiaries and affiliated corporations is set forth in the Appendix.

III. TABLE OF CONTENTS

	PAGE
I. Question Presented for Review —Whether the Court of Appeals May, Consistent With Principles of Due Process, Rely Upon an Unidentified, Unverified, Anonymous Letter Written to a Newspaper as a Basis for Reversing the Decision of the District Court	i
II. List of All Parties to the Proceeding in the Court of Appeals	ii
III. Table of Authorities	iv
IV. Opinions Below	1
V. Jurisdiction	1- 2
VI. Constitutional Provisions, Statutes and Regulations	2- 3
Fifth Amendment to the Constitution of the United States	2
Federal Rules of Evidence, Rule 802	2
Federal Rules of Evidence, Rule 901(a) General Provision	2- 3
Federal Rules of Evidence, Rule 1101(a) Courts and Magistrates	3
STATEMENT OF THE CASE	3- 7
28 U.S.C. §1332	3
Federal Rules of Evidence, Rule 606(b)	6
ARGUMENT	7-10
CONCLUSION	10
APPENDICES	11-83
A. Opinion of the United States Court of Appeals for the Sixth Circuit	11-52
B. Order of the Court of Appeals Denying Petition for Rehearing	53-55
C. Opinion of the United States District Court for the Eastern District of Kentucky	56-78
D. Testimony of John Roland Vories	79-83
E. List of Parent, Subsidiary and Affiliated Corporations	84-90

TABLE OF AUTHORITIES

	PAGE
<i>Alford v. United States</i> , 282 U. S. 687 (1931)	7
<i>Barber v. Page</i> , 390 U. S. 719 (1968)	7
<i>Bell v. Burson</i> , 402 U. S. 535 (1971)	9
<i>Brookhart v. Janis</i> , 384 U. S. 1, 3 (1965)	8
<i>Carter v. Kubler</i> , 320 U. S. 243 (1943), <i>reh'g denied</i> 320 U. S. 814	9
<i>Fritz v. Boland & Cornelius</i> , 287 F. 2d 84 (2nd Cir. 1961)	9
<i>Fuentes v. Shevin</i> , 407 U. S. 67 (1972), <i>reh'g denied</i> 409 U. S. 902	9
<i>Goldberg v. Kelly</i> , 397 U. S. 254 (1969)	8
<i>Greene v. McElroy</i> , 360 U. S. 474, 496-497 (1959)	8
<i>In Re Oliver</i> , 333 U. S. 257 (1948)	7
<i>Pointer v. Texas</i> , 380 U. S. 400, 405 (1964)	7- 8
<i>Reilly v. Pinkus</i> , 338 U. S. 269 (1949)	9
<i>Smith v. Illinois</i> , 390 U. S. 129 (1968)	7
<i>Sniadach v. Family Finance Corp.</i> , 395 U. S. 337 (1969)	9
<i>Snyder v. Massachusetts</i> , 291 U. S. 97 (1934)	7
<i>Willner v. Committee on Character and Fitness</i> , 373 U. S. 96 (1963)	9

SUPREME COURT OF THE UNITED STATES

October, 1982

No.

BRYANT ELECTRIC COMPANY, Et Al., - *Petitioners*
v.

MARY ELIZABETH KISER, Individually and
as Ancilliary Administratrix of the
Estate of Paul S. Kiser, Deceased,
Individually and on Behalf of all Other
Similarly Situated as a Class - *Respondents*

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

IV. OPINIONS BELOW:

The Opinion of the United States Court of Appeals for the Sixth Circuit is printed in the petitioners' Appendix at pages 11-52, and has been officially published at 695 F. 2d 207 (1982). The Order denying petitioners' motion for rehearing is at Appendix pages 53-55. The Opinion of the District Court is printed in the Appendix at pages 56-78, and has not been officially reported.

V. JURISDICTION

The date of the entry of the Judgment sought to be reviewed is July 21, 1982. The Petition for Re-

hearing was denied on December 23, 1982. This Court has jurisdiction to hear this case under the provisions of 28 U.S.C. §1254(1).

VI. CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

This case involves the following constitutional provisions, statutes and court rules which are set out verbatim:

Fifth Amendment to the Constitution of the United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rules of Evidence, Rule 802:

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by act of Congress.

Federal Rules of Evidence, Rule 901(a) General Provision:

The requirement of authentication or identification as a condition precedent to admissibility is

satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Federal Rules of Evidence, Rule 1101(a) Courts and Magistrates:

These rules apply to the United States District Courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the District of the Canal Zone, the United States Court of Appeals, the United States Claims Courts, and to the United States Magistrates, in the actions, cases and proceedings and to the extent hereinafter set forth.

STATEMENT OF THE CASE

This case was filed as a class action in the United States District Court for the Eastern District of Kentucky. The basis for the District Court's jurisdiction was diversity under 28 U.S.C. §1332.

The Court of Appeals in reversing the case because of juror misconduct did so on the basis of an anonymous, unverified letter to the editor of a local newspaper. The petitioners were never permitted to cross-examine the alleged author of that letter nor was any opportunity ever provided to inquire into the veracity of that anonymous document. The Court of Appeals assumed, without proof, that it was what it purported to be.

The case arose from a fire which took place at the Beverly Hills Supper Club in Southgate, Kentucky, on May 28, 1978, where 165 persons were killed and

others injured. As a result of the injuries suits were brought against nearly 1,000 separate defendants. (Appendix, p. 56) Except for the allegations against the petitioners here all of the claims have been settled or dismissed, with settlements totalling more than \$25,000,000.

Because the trial judge determined that it would be impossible to try the case against all defendants at the same time, he created several groups of defendants and indicated that the claims against each would be tried separately. Petitioners here were either manufacturers of aluminum electrical wire or of electrical devices (ordinary wall plugs and switches) designed to be attached to electric wire. (Appendix, p. 56)

The plaintiffs claimed that the connection of aluminum wire to electrical devices created a highly dangerous situation at the terminal point where the wire was wrapped under a screw which was then tightened to hold the wire in place and make electrical contact. Plaintiffs further claimed that the physical characteristics of aluminum wire made such a connection subject to overheating and created an extreme fire hazard which plaintiffs' counsel repeatedly likened to a "time bomb." (Appendix, pp. 14-16)

Plaintiffs were never able to identify the particular brand of wire or devices allegedly involved as the cause of the fire and were permitted by the trial court to proceed against a number of manufacturers on an industry-wide theory of liability. At the trial of this action the issues involved were bifurcated and the first issue presented to the jury was whether or not the

fire was caused by an aluminum wire connection of the type complained of by the plaintiffs. (Appendix, p. 13). The jury found for the petitioners on this issue and the Complaint against these petitioners was dismissed. (Appendix, p. 15)

Expert witnesses testifying for the plaintiffs described the alleged failure mechanism in aluminum wire. They agreed that while the failure rate for these connections might be only one in 200, such a rate was not acceptable and was unreasonably dangerous. They described the failure as a gradual process where overheating and loosening of the connection occurred before dangerous heat developed and explained how a connection could be checked for signs of heating or loosening. (Appendix, p. 14)

Early in the trial one of the jurors who had aluminum wire in his own home checked "a couple" of his own outlets for danger signs and found none. He mentioned this on one occasion, the next day, to other jurors during a recess. Five jurors reported hearing this comment on one occasion only. The matter was never discussed while the jury was deliberating together. The transcript of this juror's testimony at a post-trial hearing is included in the Appendix at pages 79-83.

The trial which was characterized by the district judge as "highly technical, complex and prolonged," began on December 3, 1979, and was submitted to the jury on February 20, 1980. The trial court's Opinion is set forth in the Appendix (pp. 56-78) and describes the setting of the trial in some detail.

Following the jury verdict in favor of the defendants, an anonymous letter was written to a local newspaper. The writer claimed to be a member of the jury and attempted to explain the basis for the verdict. The explanation included comment upon the aluminum wire in the writer's home. The author of this letter was never identified. (Appendix, pp. 16-18)

A motion for a new trial was filed alleging juror misconduct and relying upon the anonymous letter. The trial court conducted a hearing where each juror was put under oath and examined by the court. Counsel were not permitted to ask the jurors questions. One juror admitted checking a couple of outlets because of his concern for the safety of his family. His sworn testimony was inconsistent with facts stated in the anonymous letter, yet the Court of Appeals relied on the accuracy of statements in the anonymous letter. No juror was asked any questions about authorship of the anonymous letter, the trial judge being of the opinion that Rule 606(b) of the Federal Rules of Evidence barred such inquiry. (Appendix, pp. 62-63)

The author of the anonymous letter has never been identified. There is no basis whatsoever to find that the anonymous letter was written by any juror, as any attorney involved in the case, courtroom personnel, spectators, media reporters or anyone else who had followed the trial in the newspapers had knowledge of information expressed in the letter. The petitioners were never given the opportunity to examine anyone regarding the authenticity of the anonymous letter or the juror who allegedly authored that letter.

The Court of Appeals reversed the case based on juror misconduct. The court printed the anonymous letter verbatim as a part of its decision. (Appendix, pp. 16-18) The court stated, without qualification, that this letter was written by a juror, although there was no proof whatsoever in the record to verify this statement. The court stated that "the juror's letter made clear that the results of his investigation were a factor in his decision-making." It was on this basis that the court reversed the lower court's Opinion and ordered a new trial. (Appendix, p. 22)

It is the position of the petitioners here that the Court of Appeals heavy reliance upon the anonymous letter was a violation of due process of law in conflict with decisions of this court, other courts of appeals, and the Federal Rules of Evidence.

ARGUMENT

Previous decisions by this Court have held that the right to confront and cross-examine witnesses is fundamental to our concept of due process. *Smith v. Illinois*, 390 U. S. 129 (1968); *In Re Oliver*, 333 U. S. 257 (1948); *Snyder v. Massachusetts*, 291 U. S. 97 (1934); *Alford v. United States*, 282 U. S. 687 (1931). Indeed, there are few subjects upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trials which is this country's constitutional goal. *Barber v. Page*, 390 U. S. 719 (1968); *Pointer v. Texas*, 380 U. S. 400,

405 (1965). In almost every setting where important decisions turn on questions of fact, due process requires the right to confront and cross-examine adverse witnesses. *Goldberg v. Kelly*, 397 U. S. 254 (1970).

As this court stated in *Brookhart v. Janis*, 384 U. S. 1, 3 (1965), a denial of cross-examination without waiver "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Certain principles have remained relatively immutable in our jurisprudence. We have formalized these protections in the requirements of confrontation and cross-examination. This Court has been zealous to protect these rights from erosion. *Greene v. McElroy*, 360 U. S. 474, 496-497 (1959).

In this case the petitioners have been absolutely denied their right to examine the writer of the anonymous letter upon which the Court of Appeals has relied. The petitioners have even been denied their right of cross-examination to determine whether or not this letter was actually written by a juror, a fact which the Court of Appeals has assumed without any evidence whatsoever. The Federal Rules of Evidence, 802, specifically preclude hearsay evidence, which this letter obviously is, unless that evidence fits in one of the specified exceptions, which this letter does not. Nor do the Federal Rules of Evidence, 901(a), permit documents to be considered as evidence unless they are verified or identified in such a way as to make their legitimacy highly probable. The Federal Rules of Evidence, 1101(a), apply to the Courts of Appeals.

Other federal courts have specifically held that an anonymous letter regarding juror misconduct has absolutely no value in considering that issue and whether to reverse a judgment as a result. *Fritz v. Boland & Cornelius*, 287 F. 2d 84 (2nd Cir. 1961).

A constitutional error of the first magnitude has occurred in this case, making it an appropriate one for review by this Court. The due process rights here involved are not limited in their application to criminal matters. In *Carter v. Kubler*, 320 U. S. 243 (1943), *rh'g denied* 320 U. S. 814, the Court held that the failure to allow cross-examination was inconsistent with the due process right to a full and fair hearing. Denial of due process rights in administrative hearings has also caused this Court to consider the cases and reverse when necessary. *Reilly v. Pinkus*, 338 U. S. 269 (1949). Likewise, the Court considered the similar denial of due process rights in a hearing involving admission to the bar in *Willner v. Committee on Character and Fitness*, 373 U. S. 96 (1963). The importance of fundamental due process rights has caused the Court to consider their violations in matters involving the taking of property as well as other types of cases. *Fuentes v. Shevin*, 407 U. S. 67 (1972), *rh'g denied* 409 U. S. 902; *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969); *Bell v. Burson*, 402 U. S. 535 (1971).

The error here of basing an opinion and reversing a case upon an unverified, unsigned, anonymous letter to a newspaper is obvious. These petitioners are unable to understand or explain the basis which the Court

of Appeals used in assuming that this letter was written by a juror. The court did not explain or attempt to explain how it was able to rely on this letter. We believe that the violation here is so severe and extreme as to call for the intervention of this Court, if for no other reason than because the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

In this case where the potential liability is in terms of hundreds of millions of dollars petitioners believe their fundamental due process rights, which have unquestionably been violated in this case, deserve the protection of this court. If the Court of Appeals can flagrantly violate those rights without explanation in this case it may do so in others. It is appropriate, therefore, that this petition for certiorari be granted.

Respectfully submitted,

ROBERT C. EWALD
WYATT, TARRANT & COMBS
2600 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235

*Counsel of Record for Petitioners and
for Reynolds Metals Company*

APPENDIX A

**Nos. 80-3320
80-3358/59/60**

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

IN RE: BEVERLY HILLS FIRE LITIGATION
MARY ELIZABETH KISER, Individually and as
Ancilliary Administratrix of the Estate of
Paul S. Kiser, deceased, Individually and
on behalf of all others similarly situated
hereinafter referred to as the Class (80-
3320/80-3358/59/60,), - - *Plaintiffs-Appellants,*
Cross-Appellees,

v.

BRYANT ELECTRIC (80-3320)
CADILLAC CABLE CORPORATION, GENERAL ELEC-
TRIC, HATFIELD WIRE, LEVITON, PASS & SEY-
MOUR, JOHN I. PAULDING, REYNOLDS METALS,
SLATER ELECTRLC, AMERICAN INSULATED
WIRE, ETTCO WIRE, MARMON GROUP, RHODE
ISLAND INSULATED WIRE, SQUARE D (80-
3320, 80-3358)
COLUMBIA CABLE & WIRE COMPANY (80-3320/
80-3359)
SOUTH WIRE COMPANY and TRIANGLE PWC
(80-3320/80-3360), - - *Defendants-Appellees,*
Cross-Appellants.

*On Appeal from the United States District Court,
Eastern District of Kentucky at Covington*

Decided and Filed July 21, 1982.

Before: EDWARDS, Chief Judge; ENGEL, Circuit Judge; and WEICK, Senior Circuit Judge*

ENGEL, Circuit Judge. On the evening of May 28, 1977, fire destroyed the Beverly Hills Supper Club in Southgate, Kentucky. One hundred sixty-five patrons and employees perished in the fire and many others were injured. Extensive litigation followed in both the State and Federal courts. Underlying this appeal is a class action commenced in the United States District Court for the Northern District of Kentucky, based on diversity of citizenship. The class consists of the legal representatives of the persons killed and approximately thirty-five individuals who claimed to have been injured in the fire. Plaintiffs named as defendants several manufacturers of "old technology" aluminum branch circuit wiring, claiming those materials had been installed in the supper club and had caused the fire.¹

*Judge Weick took Senior status on December 31, 1981.

¹Plaintiffs alleged three theories of liability in their complaint: concert of action, alternative liability, and enterprise liability. The trial judge granted summary judgment in favor of defendants on the issues of alternative and enterprise liability, stating that Kentucky recognized neither theory as a basis for liability. He allowed plaintiffs to go forward on a theory of concerted action. *In Re: Beverly Hills Fire Litigation*, C. No. 77-79 (E.D. Ky. Nov. 14, 1979).

In his November 14 order, the trial judge outlined his analysis of Kentucky law of concerted action. He indicated that "[t]his doctrine imposes joint liability against '[a]ll those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it.' " *Id.* at 8 (citations omitted). He determined that three elements must be satisfied in order to prevail on this theory: a causal relation between the act and injury; cooperative or concerted activities by defendants; and violation thereby of a legal standard of care. *Id.* at 8-9. He added that concerted activity can be proved in Kentucky either by explicit or tacit agreement among defendants. *Id.* at 12. This order is not at issue in this appeal.

Shortly before the trial was scheduled to begin, the trial judge ordered that it be bifurcated. The jury first would consider the question of "causation in fact." If aluminum wiring were found to be a cause of the fire, the jury would then determine questions of liability and damages.

Plaintiffs' theory at trial was that the fire began in a "dead" or empty space within the north wall of a cubbyhole next to the Zebra Room, located on the first floor of the Supper Club.² Plaintiffs asserted that the fire originated at an aluminum duplex receptacle. The receptacle, a standard electrical outlet into which electrical appliances are plugged, was allegedly located in the cubbyhole and connected to aluminum branch circuit wiring.

Plaintiffs claimed that, due to a number of physical characteristics of old technology wiring, heat developed at the connection of the aluminum branch circuit wiring to

²The Zebra Room, comprised of the Room proper, an alcove section and a cubbyhole section, is an "L-shaped" room in the front, or southeast section of the building. It is located on the first floor of the building. At approximately 18' x 28', the Zebra Room proper is one of the smallest rooms in the large supper club, which occupies over an acre in area. Immediately to the west of the Zebra Room proper is the alcove section, approximately 10' x 10'. The cubbyhole section is to the west of the alcove section, approximately 7' x 10'. It is separated from the alcove by double doors. Immediately west of the cubbyhole is the main bar. Approximate measurements were determined from a floor plan of the Beverly Hills Supper Club submitted in evidence. All directional references throughout this opinion are based on an "assumed north" indicated on the floor plan.

The Zebra Room proper, the alcove and the cubbyhole all are bordered by a common "north wall." A staircase is located on the north side of the north wall. A fountain is located directly to the north of the staircase.

the receptacle,³ and that this heat eventually ignited the wooden studs and other building materials in the wall. Plaintiffs claimed that the heat finally caused an open flame which spread undetected within the wall for approximately

³Carl Duncan, qualified as an expert in electrical fire origin, testified that there were a number of characteristics of aluminum wire, in comparison to copper wire, which made it subject to overheating. First, large size wire was used because aluminum wiring is less conductive than copper wiring; yet, the screws used to hold the aluminum wiring in place were disproportionately small. Duncan claimed this caused a lesser percentage of conducting material to be in contact with the binding screw than would have occurred with copper wire, which made it more difficult for electricity to be transferred. Duncan claimed this phenomenon itself caused overheating. Second, he found that aluminum was more easily nicked, fractured or broken during installment than was copper; he claimed that damage to the wire reduced its conductivity at various spots. Additionally, an oxide film (rust) immediately forms on exposed aluminum when exposed to the atmosphere. A similar film forms on copper, but on copper it is conductive whereas on aluminum wire it is not. He concluded this made it more difficult for electricity to flow from wire to receptacle, therefore causing a heat buildup. Finally, Duncan testified that aluminum wiring has a tendency to "creep," which decreases further the wire's ability to conduct electricity. He defined "creep" stating:

Creep is that phenomenon of a material to flow away from pressure, and it's also referred to as cold flow. What happens is as you are torquing the screw on the material, the material itself has a tendency to flow away from pressure, and that is a physical phenomenon of the material.

The net effect of that creep or cold flow is that additional surface area of the conductor is exposed to oxidation and when relaxation occurs oxide film is formed and additional heat generated because of the, again, oxidation formation on the conductor and the energy having to break that oxide film down to maintain continuity and conductivity.

Transcript at 728-29.

one to one and one-half hours before flame broke through the wall and directly engaged the Zebra Room itself.

Defendants responded that the receptacle in the cubby-hole was not proved to have been wired with aluminum branch circuit wiring. They claimed that the fire more likely began due to copper wiring of an electrical pump that was connected to a water fountain located in front of a staircase on the north side of the north wall. The defendants also suggested that the fire started as a result of numerous fire code violations found to have existed in the club.

After twenty-two days of trial over a period of eleven weeks, the jury returned a special verdict answering in the negative the question whether the connection of old technology aluminum wired to an electrical device caused the fire at the Supper Club. Based upon that finding, the trial judge entered a general judgment in favor of the defendants. Plaintiffs moved for a mistrial, for judgment notwithstanding the verdict and for a new trial. The trial judge denied all motions. These appeals followed.

While several issues are raised in these appeals, one error, improper experimentation by a juror, is of such importance that it alone mandates vacating the judgment and remanding for new trial or other proceedings. Of the numerous other issues raised, therefore, we address only those relevant to the disposition of this appeal or those whose resolution may facilitate any proceedings on remand.

I

During the trial, one of the jurors performed an improper experiment when he investigated the condition of the aluminum wiring and connections in his home. He then reported his findings to other jurors, findings which were factually at odds with plaintiff's theory of how the fire began.

Plaintiffs sought to show throughout the course of the trial that aluminum branch wiring is more likely to overheat and cause fires than is copper wiring. Carl Duncan, qualified as an expert in electrical fire origin, testified that an early indication of the degenerative process leading to overheating is that binding screws holding the wire appear to be loose. This loosening, he testified, aggravates the inability of the wire to conduct electricity. As the process allegedly occurs over a period of 5 to 10 years, plaintiffs characterize aluminum wiring systems as "time bombs."

Following this testimony, the juror examined receptacles in his home. He pulled receptacles from their boxes and checked the binding head screws for tightness. He also looked for receptacles manifesting later stages of degeneration. His experiment tended to contradict evidence presented by the plaintiffs on the hazards of aluminum wiring. The juror found nothing wrong with his own receptacles which, he claimed, had been installed eleven years earlier. The juror believed that, under plaintiffs' theory, the receptacles would have been in place long enough for some degeneration to have occurred. He also found that the screws holding aluminum wiring to his electrical devices in his outlets were tight.

After the verdict for the defendants had been rendered and the jury discharged, the juror wrote an anonymous letter to the *Kentucky Enquirer*, a newspaper of general circulation in northern Kentucky. In the letter, he explained the reasons for his decision and challenged the validity of the plaintiffs' evidence when compared to finding in his own home.⁴ He also expressed the view that

⁴The letter states:

I want to let the people know how I reached a decision on the Beverly Hills Trial. This is the first time I have ever been called for Jury Duty . . . it was something I think everyone

(Footnote continued on following page)

the fire was caused by numerous fire code violations found in the Supper Club.

In the post-trial evidentiary hearing, the trial judge learned that the juror communicated this information to at least six other jurors during the course of the trial. At least one juror recalled having privately discussed this matter with the experimenting juror during the course of the jury deliberations. Thereafter, plaintiffs moved for a mistrial.

(Footnote continued from preceding page)

should do just to find out how the system works. It could have been shortened—it was rather repetitious, and a two hour lunch—I'm used to a half hour.

The receptacles that were taken out of the front part of the building (not in the fire) were wired with aluminum branch circuit wiring.

These were sent up state and put on a test rack. The Jury never had an opportunity to see these receptacles even though they were in the court room. New receptacles however were passed showing how aluminum could be wired—some correctly & some wrong.

In our deliberations, the receptacles that were put on test were with the many artifacts of the case. This is the first time I got to see them. (about 10 or 12 receptacles)

Two of these receptacles had the [aluminum] wire counter clockwise under the binding head screw which is wrong.

When tightening a screw clockwise the wire under the screw should be clockwise also.

Two more outlets or receptacles, the [aluminum] wire was loose under the binding head screw—I could move the wire.

In another outlet, I wanted to see if I could tighten a binding head screw that appeared to be tight. I got about 1/10" turn on the screw.

The first week of the trial the binding head screw came up about 500 times—even [the trial judge] started to get upset with the repetition.

(Footnote continued on following page)

The trial judge denied plaintiffs' motions for mistrial for judgment notwithstanding the verdict, and for a new trial based upon the juror's conduct, observing:

In the context of the trial length, the quantity of evidence presented and the number of witnesses called by each side, this action by a juror appears to be of minor consequences and not a sufficient intrusion upon the deliberative process as to require the setting aside of the jury verdict.

(Footnote continued from preceding page)

I went home one night, pulled about 15 outlets from their boxes and wanted to see how loose the connections were.

I could not turn any of the screws one bit. My home is wired with [aluminum]. I bought the house 11 years ago in 1969. The plaintiffs talk about stress relaxation and creep which would cause the [aluminum] wire to loose its torque after a short period of time. My outlets are still tight after 11 years of use, How come these are not loose?

Another part of the trial, a list of code violations were read off as long as your arm. A witness asked if they contributed to the fire, the answer was no.

These were violations that were found in most of the unburned portions of the fire what about the violations that were destroyed by the fire no one knows about?

This is what caused the fire!! In my opinion one violation of code is too many. They should close a place down and keep it closed until the violations are corrected. When I go out on a weekend to eat or take in a show for enjoyment, I want to come home [safely].

There was a flash of fire seen in the Garden room about the same time there was smoke in the Zebra Room. Where did it start? God only knows where that fire started and how it started. Why is it that a person has to be hurt or maybe killed before a problem is corrected?

I also want to let the people who lost family & friends in the tragic fire of Beverly Hills that my prayers are with them.

one Juror on the Beverly Hills trial

In Re: Beverly Hills Fire Litigation, C. No. 77-79 at p. 8 (E.D. Ky. April 7, 1980).

Plaintiffs claim that the juror's investigation was an impermissible experiment requiring that the verdict be set aside. Defendants respond that the juror's action was harmless. They further stress that the inflammatory language regarding "time bombs" made it almost inevitable that the experiment would occur. Since the trial was expected to be a long one, the defendants claim that it is unreasonable to expect that a juror would wait until the end of the trial to inspect his own home for dangers which the plaintiffs had so characterized. Defendants contend that the juror's investigation was not in the nature of an "experiment" nor a purposeful attempt to develop information about the case being tried, but was more in the nature of a personal and unrelated experience which could not have affected the judgment of that juror or those to whom he communicated that information.

Upon a careful examination of the record and the applicable law, we regretfully conclude that the jury verdict was impermissibly tainted by what can only be characterized as an improper juror experiment.

The general rule is that a juror may not impeach his verdict. Fed. R. Evid. 606(b). See *McDonald v. Pless*, 238 U. S. 264 (1915); *Womble v. J. C Penney*, 431 F 2d 985 (6th Cir. 1970); *Gault v. Poor Sisters of St. Frances*, 375 F. 2d 539 (6th Cir. 1967). The rule ensures that jurors will not feel constrained in their deliberations for fear of later scrutiny by others. Further, it guarantees that jurors cannot manipulate the system when their views are in the mi-

nority by repudiating an earlier verdict and obtaining a mistrial.⁵ It thus advances important policy considerations.

An exception to the general rule has developed where external factors are shown to have existed. As stated by Judge Peck in *Womble, supra*, "the [general] rule does not preclude inquiry into any extraneous influences brought to bear upon the jury in order to show what the influences were and whether they were prejudicial." 431 F. 2d at 989. See *Stiles v. Lawrie*, 211 F. 2d 188 (6th Cir. 1954). Rule 606(b) specifically allows inquiry into external influences upon a jury.⁶ This exception is necessary to assure that the parties receive a fair trial and that the integrity of the system itself is maintained. See *United*

⁵As the Advisory Committee on the Proposed Rules of Evidence noted:

The mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harrassment. See *Grenz v. Werre*, 129 N.W. 2d 681 (N.D. 1964). The authorities are in virtually complete accord in excluding the evidence . . .

⁶Rule 606(b) provides:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, *except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror*. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Fed. R. Evid. 606(b) (emphasis added).

States v. Ferguson, 486 F. 2d 968 (6th Cir. 1973); *Briggs v. United States*, 221 F. 2d 636 (6th Cir. 1955).

Defendants contend that the juror's act in checking his own wiring was "too simple and natural to be deemed in any sense an experiment." *Stone v. City of Florence*, 28 S. E. 2d 409, 410 (S.C. 1943). Rather, they suggest, knowledge gleaned from that activity is in the nature of general knowledge or common experience, which a juror is entitled to consider in his deliberations. In our view, the juror experimentation here was more than a mental or emotional reaction or expression. The experiment, in fact, injected extraneous information into the trial. While the juror's conduct here may very well have been "simple and natural," it was, under any test, an experiment.

It is not uncommon for a court to instruct a jury that jurors may consider the evidence in light of their general knowledge and experiences of life, and the trial judge gave a similar instruction here.⁷ One function of the jury is to infuse a practical sense into the legal theories offered at trial. Courts therefore have generally found discussions regarding such experiences quite unobjectionable. See *Stephens v. City of Dayton*, 474 F. 2d 997 (6th Cir. 1973); *Womble, supra*, 431 F. 2d at 989.

On the other hand, our court has not hesitated to declare mistrials where the activity went beyond mere general knowledge and was instead a response to the facts of the

⁷The trial judge instructed the jury in part as follows:

You are expected in deciding this case to use your judgment and common sense. Give the evidence and the testimony of the witnesses a reasonable and fair interpretation based upon your knowledge and experience of the natural tendencies of human beings, that is what you bring with you into the courtroom, your lifetime of experience, your experiences with human beings and how they react.

Transcript at 7344.

case at hand. An investigation is improper where it "amount[s] to additional evidence supplementary to that introduced during the trial." *Womble, supra*, 431 F. 2d at 989.⁸ Thus, our court ordered a new trial where a juror brought into the jury room a manual published by the Highway Department, but not introduced at trial, purporting to show the length of skid marks made by automobiles at different speeds. *Stiles v. Lawrie*, 211 F. 2d 188 (6th Cir. 1954). Similarly, our court held that a new trial was properly granted where during the trial a juror had travelled to plaintiff's property to view certain cattle which were the subject of litigation, reporting back to the jury that he thought that the cattle looked like "about the best looking he had seen in a long time." *Aluminum Company of America v. Loveday*, 273 F. 2d 499 (6th Cir. 1959), *cert. denied*, 363 U. S. 802 (1960).

In the present case the juror's investigation had the effect of putting both himself and the other jurors with whom he discussed his findings in possession of evidence not offered at trial. The juror tested the outlets for tightness and compared his results to the evidence in the case, observing in his letter to the *Enquirer* that "my outlets are still tight after 11 years of use, how come these are not loose?" It is clear that additional evidence was before at least one member of the jury.

In fairness, it is apparent that the juror was troubled by references made to the dangerous propensities of aluminum wire.⁹ The juror indicated his concern at the evidentiary hearing following the trial:

⁸*See also United States v. Beach*, 296 F. 2d 153 (4th Cir. 1961) ("the law is well settled that a case must be decided upon evidence submitted in court during the trial and not upon private experiments of the jurors").

⁹Defendants point to four occasions when counsel for plaintiffs used the phrase "time-bomb" and two other occasions when witnesses for plaintiff lent support to that characterization.

Q. Approximately when did that [his check of the fuse box] occur?

A. Sir, the first part of the trial, it come out that they they was talking about aluminum wire wired to outlets that was like a time bomb; it could go off any time, and they brought out slides and they was showing the outlet glowing and charring and they showed the studs burning; and that's why I went home and checked them that night. I didn't check the aluminum for tests or experiments or to see if it was safe. I was concerned with my family.

Transcript of Post-trial Examination of Jurors at 39. Whatever the juror's motives, however, the potential for prejudice inherent in an out-of-court experiment in this case remains. It is impossible to determine without the benefit of a vigorous cross-examination following formal introduction of evidence whether an experiment duplicated what actually occurred in the case. Highly misleading results can follow. Here, the juror assumed his electrical outlets were constructed in the same manner as those offered by plaintiffs. He then made conclusions directly related to the outcome of the case, and he communicated these facts to other jurors. No opportunity was afforded either litigant to determine whether the juror's wiring was aluminum and, if so, whether it was "old technology" wire. They further were unable to consider other conditions that may have accounted for the differing results. In short, the juror considered evidence from an experiment which was not subject to scrutiny or cross-examination by any party.

Our circuit has recognized that such an error can rarely be viewed as harmless. The jury's receipt of such extraneous information "requires that the verdict be set aside, unless entirely devoid of any proven influence or the probability of such influence upon the jury's deliberations

or verdict." *Stiles, supra*, 211 F. 2d at 190. Here, the juror's letter made clear that the results of his investigation were a factor in his decisionmaking. While influence on a single juror may be enough to necessitate reversal and remand, *see Loveday, supra*, 273 F. 2d at 500, the error is particularly grievous because a unanimous verdict was required and the juror communicated his findings to other jurors.¹⁰ We conclude that the controlling law permits no alternative to reversal.¹¹

In remanding, the question remains whether anything can be done to avoid repetition of this incident. The trial judge instructed the jury not to seek outside information. Obviously, the juror's concern for his safety played a substantial part in the experiment which was conducted despite the instruction. While due regard ought to be given to the customary latitude which counsel need in order to bring life and meaning to the case, we suggest that the court on retrial may wish to confer with counsel on the means by which they can avoid alarming the jury. It would probably not be inappropriate under the circumstances if counsel

¹⁰In *Stiles*, the court explained why a presumption of prejudice is necessary. It stated:

The foreman of the jury was asked by the trial court whether [the extraneous evidence] played any important part in the final verdict of the jury, and his reply was: "I don't know, Judge." Neither did the district court know, nor could it have known, whether this evidence, introduced without the knowledge of court or counsel after the retirement of the jury, influenced the verdict; and, certainly, this court, farther removed from the trial, could have no way of knowing what effect this extraneous evidence produced upon the verdict.

Stiles, supra, 211 F. 2d at 190.

¹¹Because the juror discussed his findings with other jurors, we need not decide whether an uncorroborated claim that an experiment was conducted, which potentially could be used merely as a tool to manipulate the verdict, would support a mistrial.

were cautioned in the use of inflammatory language. Perhaps the trial court itself could give more explicit precautionary instructions, provided, of course, that they themselves were balanced and did not create the very hazard they might be designed to avoid. All of this, however, we leave to the good judgment and discretion of the trial court.¹²

II

Two claimed errors concern the severance of causation from other issues in the trial.

Plaintiffs first assert that the trial judge had no authority to isolate the issue of causation. It is well settled that the ordering of separate trials is within the sound discretion of the trial judge. *Kosters v. Seven-Up Co.*, 595 F. 2d

¹²Plaintiffs add that a second piece of extraneous information was improperly before the jury. Some jurors viewed a publication entitled "Reconstruction of a Tragedy," even though the trial judge refused to admit the document into evidence on the grounds it was hearsay. A copy of the publication had been admitted inadvertently as part of a deposition to which it was appended. Plaintiffs assert their counsel simply failed to note the appendages to the exhibit, which is not surprising given the great quantity of evidence introduced at trial. Our examination of the document in question convinces us that the inadvertent introduction of the documents was not prejudicial as it was probably more damaging to the defendants than to the plaintiffs. The pamphlet indicated that the fire was electrical in nature and started in a concealed space in the Zebra Room. It further ruled out defendants' theory that the fire started at the water pump, and it contained several explicit pictures of the tragedy. In any event, it is highly unlikely that this circumstance will recur.

Plaintiffs also claim it was error for the trial judge to have refused to ask certain voir dire questions of potential jurors. Plaintiffs did not object at the completion of voir dire; moreover, we find the trial judge did not abuse his discretion. See *Eisenhauer v. Burger*, 431 F. 2d 833 (6th Cir. 1970).

347 (6th Cir. 1979); *Crummet v. Corbin*, 475 F. 2d 816 (6th Cir. 1973); *Moss v. Associated Transport*, 344 F. 2d 23 (6th Cir. 1965). Plaintiffs argue, however, that no case law supports severance of the issue of causation; rather, only severance of liability and damages has been allowed. This view-point is inconsistent with the language of Fed. R. Civ. P. 42(b), which provides in part:

Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial . . . of *any* separate issue

(emphasis added). There is thus no reason to adopt a different standard with regard to severing causation.

As the Rule indicates, and as our circuit has recognized, the court in ordering separate trials must consider several issues such as potential prejudice to the parties, potential confusion to the jury, and the relative convenience and economy which would result.¹³ See, e.g., *Koster, supra*, 595 F. 2d at 355-56. A balance of these concerns led the Eighth Circuit to approve bifurcation of the causation issue in *Beeck v. Aquaslide 'N' Dive Corp.*, 562 F. 2d 537 (8th Cir. 1977). The court observed:

Evidence of plaintiffs' injuries and damages would clearly have taken up several days of trial time, and because of the severity of the injuries, may have been prejudicial to the defendant's claim [that it did not manufacture the product that injured plaintiff]
Judicial economy, beneficial to all the parties, was

¹³Plaintiffs also claim they were prejudiced by the lateness of a decision to bifurcate the proceedings. We admit some sympathy with this complaint, but we cannot say that any prejudice to the plaintiffs was not outweighed by other considerations of efficiency and convenience. In any event, it is not likely to recur.

obviously served by the trial court's grant of a separate trial.

Id. at 542.

The *Beeck* court also recognized that whether resolution of a single issue would likely be dispositive of an entire claim is highly relevant in determining the efficacy of bifurcation. The trial judge in the present case considered both the projected length of the trial and the likelihood that a resolution of the causation issue could shorten it.¹⁴

The conclusion of the trial judge has support in the record. The trial on causation alone took thirty-two days. Proof regarding the further issues of liability among the numerous defendants and of damages would be extensive

¹⁴The trial judge described the potential advantages as follows:

This is a class action on behalf of approximately 200 persons against 23 defendants who have been grouped together as the "Aluminum Wire and Device Group." The parties estimate that approximately 40 trial days will be required for the presentation of several hundred witnesses. Critical to plaintiffs' case is the issue of causation. Before any determination of liability upon any of these defendants can be made, it must be established that "old technology" aluminum wire either caused or contributed to the fire at the Beverly Hills Supper Club May 28, 1977. While such establishment does not in and of itself determine liability of any or all of the defendants, a negative determination would free them from such liability. There is reason to believe that a determination of this issue would materially reduce the time required to try this case. While a determination for the defendants would as a matter of law end the proceedings, it is entirely possible that an affirmative determination might enhance the likelihood of settlement.

In Re: Beverly Hills Fire Litigation, C. No. 77-79 (E.D. Ky. Dec. 12, 1979).

and expensive.¹⁵ It therefore was reasonable for the trial judge to conclude that litigation of those issues should be avoided if they might be mooted by an adverse finding on the causation issue. The value of severance in expediting this case has already been proved. Had the juror experiment required a mistrial after the *entire* case had been tried, many more weeks of effort would have to be repeated.

A strong argument can, it is true, be made against the bifurcation of a trial limited to the issue of causation. There is a danger that bifurcation may deprive plaintiffs of their legitimate right to place before the jury the circumstances and atmosphere of the entire cause of action which they have brought into the court, replacing it with a sterile or laboratory atmosphere in which causation is parted from the reality of injury. In a litigation of lesser complexity, such considerations might well have prompted the trial judge to reject such a procedure. Here, however, it is only necessary for us to observe that the occurrence of the fire itself, a major disaster in Kentucky history by all standards, was generally known to the jurors from the outset. Further, the proofs themselves, although limited, were nonetheless fully adequate to apprise the jury of the general circumstances of the tragedy and the environment in which the fire arose. As a result, we hold that the trial judge did not abuse his discretion in severing the issue of

¹⁵Certainly evidence regarding whether defendants breached a legal standard of care will be extensive. Moreover, because each of several defendants could insulate itself from liability by proving it was not part of any express or tacit agreement to produce defective wiring, it is anticipated that much evidence would be submitted regarding this issue. See note 1 *supra*. A defendant further may offer evidence tending to show its wiring, because of inherent metallurgical or other differences, would perform differently from that of other companies. Additionally, the damages issue remains unresolved.

causation here. In so ruling, however, we emphasize that the decision whether to proceed in the same manner on any retrial is within the discretion of the trial judge, who will undoubtedly be benefitted from the experiences in the first trial as he makes his decision.

The plaintiffs next claim that severance, even if not in itself error, nonetheless resulted in the improper exclusion of evidence relevant to the issue of causation. Plaintiffs offered several documents as evidence supporting their contentions that aluminum wiring has a greater propensity to cause fires and that some defendants knew of this propensity. The trial judge excluded some documents in their entirety,¹⁶ and allowed certain evidence admitted upon deletion of references to individual defendants.¹⁷ *In Re: Beverly Hills Fire Litigation*, C. No. 77-79 (E.D. Ky. Jan. 7, 1980).

In reviewing the documents at issue, the trial judge determined that several documents, though admissions as to some defendants, were hearsay as applied to other defendants. *See* Fed. R. Evid. 802; 801(d)(2). He determined further that documents indicating knowledge of some de-

¹⁶Those documents carried the Exhibit numbers:

#1182	#1928	#19,528
1291	15,310	19,542
1325	15,324	19,553
1471	15,372	19,557
15,552A	15,501	21,303
1733	15,557	25,001
1924	15,682	

¹⁷See specifically documents carrying exhibit numbers #1920, 1926, 19,529, 1301, 1976, 3691, and 19,610. Plaintiffs also claim that some of these documents were not permitted to be submitted to the jury during deliberations. They do not tell us which documents were not considered, nor do they indicate which were considered with portions deleted.

fendants were perhaps relevant to liability but were not relevant to causation, which alone was before the jury. *See* Fed. R. Evid. 401. Finally, he determined that those documents which were relevant to the issue of propensity of aluminum to cause fires were nonetheless inadmissible because their probative value was outweighed by the potential for prejudice if a specifically identified defendant were singled out. *See* Fed. R. Evid. 403.

Evidence is not admissible in all cases where it is relevant. Fed. R. Evid. 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Under this rule, admission of such evidence is placed within the sound discretion of the trial court. *United States v. Brady*, 595 F. 2d 359 (6th Cir. 1979).

We have reviewed the documents deemed inadmissible by the trial judge and find that he did not abuse his discretion in excluding them. To the extent that the documents did not refer only to the knowledge of the defendants but also to the propensity of aluminum to cause fires, they were relevant. They were, however, largely cumulative of plaintiffs' evidence respecting the characteristics of aluminum wire.¹⁸ Moreover, as the trial judge observed, they may have improperly prejudiced the jury.

The trial judge on remand may decide not to isolate causation from liability. In that case, the evidence could in the trial court's discretion be offered against some de-

¹⁸Three expert witnesses testified regarding the dangerous propensities of aluminum wire.

fendants with an appropriate limiting instruction. *See* Fed. R. Evid. 105. If the case is again bifurcated, it again will be within the trial judge's discretion whether and under what circumstances to admit the documents. Although we see the dilemma caused by these exhibits as one argument working against the employment of bifurcation here, it does not constitute a basis for denying it altogether, if in the discretion of the trial judge it remains the most efficient method of managing this complex litigation on remand.

III

The plaintiffs in their appeal and the defendants in their cross-appeal each argue that their respective motions for a directed verdict should have been granted at the conclusion of the trial. Our careful review of the extensive record reveals a hotly contested issue of causation that properly was submitted to the jury. We do, however, believe that the motion of defendants is worthy of extended consideration.

Defendants claim that plaintiffs offered no proof tending to show that the duplex receptacle actually failed. They admit that evidence was offered which, if believed, tended to show that aluminum wire failed more often than did copper wire, that the fire started in the north wall of the cubbyhole, and that a duplex receptacle was mounted on that wall. Defendants assert, however, that plaintiffs' only proof that aluminum wiring actually failed is that it is statistically more likely that aluminum will fail. They add that plaintiffs offered no proof that the symptoms of aluminum wiring failure actually occurred, nor did they show that the duplex failed to function.

Defendants also claim that the jury had no method to determine that aluminum rather than copper wiring failed.

They thus liken the present case to *Rollins v. Avey*, 296 S. W. 2d 214 (Ky. 1956). In *Rollins*, plaintiff had a furnace installed in her living room. Thirty or forty minutes thereafter, a gas explosion occurred in the house. The plaintiff had three other gas appliances in her home, and there was no evidence that the furnace exploded or was destroyed. The Kentucky Supreme Court affirmed a directed verdict for defendants, finding that plaintiff's failure to determine which instrumentality failed was fatal to plaintiff's case. Similarly, defendants assert, plaintiffs have not pinpointed the instrumentality causing the fire here.

We are, of course, bound to apply Kentucky law to the substantive issues in this diversity case. *Erie R.R. v. Tompkins*, 304 U. S. 64 (1938). In determining whether plaintiffs presented enough evidence of cause in fact to avoid a directed verdict, the relevant standard in consideration of such a motion is that

plaintiff is entitled to the most favorable inferences and construction attributable to the evidence. If such evidence is so regarded and substantially tends to support the cause of action, the verdict should not be directed against him.

Fields v. Western Kentucky Gas Co., 478 S. W. 2d 20, 22 (Ky. 1972).¹⁰

The Kentucky view regarding when evidence of causation is sufficient to reach a jury is discussed in *Huffman v. SS. Mary & Elizabeth Hospital*, 475 S. W. 2d 631 (Ky. 1972):

¹⁰We are bound by state law regarding the sufficiency of evidence. *Standard Alliance Ind. v. Black Clawson Co.*, 587 F. 2d 813, 823 (6th Cir. 1978); *Chumbler v. McClure*, 505 F. 2d 489, 491 (6th Cir. 1974).

[L]egal causation may be established by circumstantial evidence. While reasonable inferences are permissible, a jury verdict must be based on something other than speculation, supposition or surmise. The type of evidence that will support a reasonable inference must indicate the *probable* as distinguished from a *possible* cause There must be sufficient proof to tilt the balance from possibility to probability.

Id. at 633 (citations omitted) (emphasis in original).

Where an incident could result from more than one cause, plaintiff tips the balance from possibility to probability only by ruling out other theories of causation:

[W]here an injury may as reasonably be attributed to a cause that will excuse the defendant as to a cause that will subject it to liability, no recovery can be had.

Sutton's Adm'r. v. Louisville & N.R. Co., 181 S. W. 938, 940 (Ky. 1916). That is, it must be more likely than not that the incident in question occurred as the result of the cause posited by plaintiff.

Thus, defendants invariably receive a judgment in their favor as a matter of law in Kentucky where plaintiffs are unable to isolate one cause, either by direct evidence or, more relevant to the present case, by eliminating other possible causes. For example, summary judgment for defendant was affirmed where a pool of gas exploded but it was unclear whether mechanical defects, human intervention or other causes ignited the pool. *Highway Transport Co. v. Daniel Baker Co.*, 398 S. W. 2d 501 (Ky. 1965). Similarly, an argument that brake failure occurred because the brakes at issue did not conform to factory specifications was rejected where other causes such as dirt in the brake lining, improper adjustment of the brake drum or improper tire pressure were not eliminated as causes. *Midwestern*

V.W. v. Ringley, 503 S. W. 2d 745 (Ky. 1973). In *Rollins, supra*, plaintiffs offered no evidence that excluded other gas appliances as possible causes.²⁰

Conversely, the court in *Fields v. Western Kentucky Gas Co.*, 478 S. W. 2d 20 (Ky. 1972), found that plaintiff had presented a causation theory sufficient to go to a jury. An explosion occurred in a manhole, and plaintiff's witness testified that a seepage of natural gas was the cause. More important, he was able to state that the other proposed causes (sewer gas or a solvent used to seal pipes) were improbable ones. In reversing a directed verdict for defendant, the court stated:

Although a jury may not be permitted to speculate when the probabilities of an event's having happened in one of two or more ways are equal and there is no evidence as to which way it did happen, it is neither legal "speculation" nor "conjecture" when a jury finds as a fact that an event happened by reason of a particular cause when the evidence on behalf of a party, if believed, is sufficient to show that it is more likely than not that the event occurred as a result of the cause so found.

²⁰See also *Huffman v. SS. Mary & Elizabeth Hospital*, 475 S.W. 2d 631 (Ky. 1972) (theory that plaintiff contracted serum hepatitis as a result of blood transfusion rejected where plaintiff unable to rule out other causes such as improperly sterilized needle or puncture wound occurring outside hospital); *Briner v. General Motors Corp.*, 461 S. W. 2d 99 (Ky. 1970) (theory that defective air conditioner caused shimmying which in turn caused steering mechanism to freeze, thereby causing an accident, rejected where plaintiff unable to rule out possibilities that plaintiff struck an object or that tire was deflated, brakes malfunctioned or tie rod broke); *American Insurance Co. v. Horton*, 401 S. W. 2d 758 (Ky. 1966) (causation theory that ethylene gas used to ripen bananas caused an explosion rejected where plaintiff unable to exclude sewer gas or natural gas as causes).

Id. at 22. Thus, a directed verdict for defendants would be improper where plaintiffs' evidence, if believed, could establish that other possible causes could not have precipitated the Beverly Hills fire, thereby making it more likely than not that it was caused by aluminum wiring.

The evidence here, if believed, could convince a jury that the fire began within the north wall of the Zebra Room cubbyhole.²¹ It also tended to show that the fire started at a duplex receptacle located on that wall.²² The jury could have found from the evidence that the duplex receptacle was wired with aluminum branch wiring,²³ and that alu-

²¹Duncan testified that the fire was able to ignite and spread without anyone learning of it because the "dead space" behind the wall offered an unobstructed fire path with fixed barriers. As further support for his hypothesis, he noted that the walls collapsed inward toward the room, indicating that structural support inside the wall had given way.

²²Duncan was able to pinpoint the origin of the fire from its "burn pattern," that is, marks indicating the path taken by the fire. He testified that the burn pattern showed the fire moved from west to east, originating approximately 48" east of the main bar room wall and 4' to 4½' off the floor. James Donnelly, an expert witness employed at Systems Engineering Associates, concurred in this assessment.

²³William White, the electrician who wired the supper club, testified that he wired the duplex receptacle in the cubbyhole with aluminum branch circuit wiring. Duncan opined that the wiring was aluminum because such wire was found in a panel box furnishing electricity to the Zebra Room. A report of the Consumer Product Safety Commission disclosed the same information. Thomas McClorey, an expert qualified in architecture and civil engineering, testified he found aluminum wire in the panel box. Dr. Aronstein ran tests which indicated that the club was wired with old technology aluminum wire.

Dr. Aronstein reasoned that one could infer from the fact that no wire was found on certain devices that it was made of aluminum.

(Footnote continued on following page)

minum wiring failed fifty to fifty-five times more often than did copper wiring. Dr. Jesse Aronstein, a mechanical engineer, testified that other aluminum devices in the building were found in various stages of deterioration. Additionally, Eileen Druckman and Michael Sims testified regarding their perceptions of heat and odor, which could have buttressed plaintiffs' theory regarding the symptoms of electrical overheating.²⁴ Evidence was presented indicating that receptacles may continue to be operable while overheating, which the jury could have found was a re-

(Footnote continued from preceding page)

Aluminum, but not copper, wire would have melted at temperatures reached in the fire. Duncan testified that aluminum wire melts at approximately 1100° F, while copper melts at approximately 1950° F; further, Duncan stated that the Beverly Hills fire reached temperatures between 1500° and 1200° F.

²⁴McClure testified that a fire in the north wall would cause a stratification of the air in the heating ducts at the top of the ceiling. He stated that this stratification would cause one of the air vents in the Zebra Room to put out cold air, the air which was at the bottom of the air duct. The second vent would put out hot air because that would have been the air which was heated in the air duct as it passed the point of the fire's origin, and that heating process would have caused the heated air to rise above the cooler air-conditioned air. Michael Sims, a guest at a wedding reception in the Zebra Room, gave testimony which could support this theory. He claimed he heard rumbling noises above and below the room, noticed that the room kept getting warmer on the side where the wedding party was located, but that the room was very cool on the other side. In fact, he stated, the room was so cool on the other side that women were putting on sweaters. Eventually, he also began to feel vibrations, and he saw the wedding cake begin to melt.

Both McClure and Eileen Druckman testified they smelled strange odors. Druckman smelled something like candles that had been blown out; Sims smelled an odor like boiling beef or battery acid. The jury could have found those perceptions similar to plaintiffs' argument that overheating produces an acrid smell.

sponse to defendant's assertion that the wire did not fail because electrical devices continued to function.²⁵

The evidence, if believed, also could have eliminated other causes for the fire such as devices in the adjoining alcove area,²⁶ short-circuiting,²⁷ negligent workmanship, the pump referred to by defendants,²⁸ or code violations existing in the Club. Contrary to defendant's assertions, the jury could have found that a light switch located nearby

²⁵Patty Kolbinsky, a club employee, testified that a light and adding machine, attached to the cubbyhole, continued to work. Duncan explained this was consistent with symptoms of overheating. He testified that when heat buildup occurs, the insulation material vaporizes and there is deterioration of the thermal plastic component parts of the receptacle itself. Heat from this area is obvious, he stated, and there is charring at the point where the wire connects with the receptacle. He suggested that the receptacle is still operable at this point because the circuit has not been interrupted. Dr. Aronstein agreed the circuits can work while overheating.

²⁶Duncan testified that any malfunction in an alcove device would have resulted in rapid flame propagation within the room. He concluded that the fire would have been evident to others at an earlier point had it not occurred within the concealed space.

²⁷A short circuit, Duncan opined, would cause a different burn pattern. He also testified that a profile of the fire showed that there had been long-term heating deterioration of the fire area. Overheating, he suggested, is sustained over a long period of time. A short-circuit is an instantaneous release of energy which causes an immediate elimination of service rather than allowing a buildup of heat.

²⁸Duncan testified that if the pump cord had started the fire, the burn pattern would have been different and the cord itself would have been totally consumed by the fire. He stated further that such origin could not have provided the consistent heating of materials that occurred in the area of origin.

was not the source of the fire;²⁹ further, they could have found that there were no other electrical devices in the cubbyhole area.³⁰ Evidence regarding exclusion of these causes, if believed, tended to make it more probable than not that the aluminum wiring attached to the duplex actually failed. Unlike *Rollins*, the jury could have found that the instrumentality causing the fire had been identified. A directed verdict therefore would have been improper here.

Defendants argue that plaintiffs engaged in a "compounding of inferences" in proving causation, a method not condoned in Kentucky courts as it leads to verdicts based on surmise or speculation. See, e.g., *Rollins*, *supra*;³¹ *Briner v. General Motors Corp.*, 461 S.W. 2d 99 (Ky. 1970). Those cases are inapposite to our result here.

Kentucky courts generally are convinced that the plaintiff is stacking inferences where plaintiff constructs a theory with several hypotheses, none of which is supported by either direct or circumstantial evidence.³² In the present

²⁹Duncan was asked on redirect examination about an earlier reference to the switch, and he stated that different burn patterns would have resulted from fire originating at the switch.

³⁰Duncan testified that evidence of any further service in the cubbyhole was unapparent to him.

³¹The *Rollins* court was primarily concerned with whether plaintiff offered evidence sufficient to submit her case to the jury using a *res ipsa loquitur* theory as a basis for liability. Because liability is not yet at issue in the present case, that discussion in *Rollins* is not relevant here.

³²For example, in *LeSage v. Pitts*, 223 S.W. 2d 347 (Ky. 1949), a loose wall fell on plaintiff. There was no direct evidence that defendant left the wall blocks in an unfixed position. The court rejected plaintiff's characterization of events, stating:

Appellant, from the fact that mortar was attached to the block which rolled with him, infers that the block was anchored

(Footnote continued on following page)

case, each fact depended on by plaintiffs is supported by some evidence in the record for the jury to assess. Electrician William White testified that he placed aluminum wire in the receptacle. As suggested above, there was further circumstantial evidence which could have supported a finding that the fire originated there. Absent proof of the existence of the wire, the verdict may have been based on an impermissible stacking of inferences. White's direct testimony avoided this result.

(Footnote continued from preceding page)

safely in its place in the original erection of the wall. He then theorizes, without even a scintilla of evidence to support the theory, that, in constructing the wall, appellee forgot, or at least failed, to leave openings in which to place the steel structure. This theory calls for an inference to be drawn upon the first inference. He further theorizes that, having forgotten to leave the openings in the first instance, appellee cut the openings after having erected the wall in solid formation. This is an inference drawn upon the second inference. Finally, he theorizes that, in cutting the openings in the solid wall, the block causing the injury was loosened and left in an unsafe condition in its original position. This is an inference based upon the third inference.

Id. at 352.

In *Briner, supra*, plaintiff was unable to show her car had defective brakes at the time defendant serviced the car; thus, any further proof that investigation should have occurred was an unconnected inference built on an earlier inference. When the Kentucky court speaks of "inferences," therefore, it refers not to conclusions drawn inductively from circumstantial evidence, but rather to conclusions drawn from a series of statements unsupported by any independent evidence. *Miller v. Watts*, 436 S. W. 2d 515, 517 (Ky. 1969) ("The kind of speculation that is not allowable occurs when the probabilities of an event's having happened in one or two or more ways are equal and there is *no evidence* as to which way it happened.") (emphasis in original); see also *Klingensfus v. Dunaway*, 402 S. W. 2d 844, 846 (Ky. 1966).

We obviously do not by our analysis mean to suggest that the Beverly Hills fire necessarily was caused by aluminum wiring. An extraordinary amount of circumstantial evidence was considered by the jury, which was subject to differing, yet reasonable interpretations. For example, the credibility of White, who defendants claim was induced to change his original story, was clearly at issue.

It may be that the vigorous and effective cross-examination of White induced the jury to disbelieve him. Also, defendants presented a great deal of information regarding other theories of causation, which the jury may have found more persuasive. It is not for us to pass on the credibility of White's testimony, or of that of any other witness, as defendants would seem by their arguments to urge. We merely find that, giving the evidence a construction favorable to plaintiffs, enough evidence was presented to avoid a directed verdict in favor of defendants. *See Fields, supra*, 478 S. W. 2d at 22.

IV

Plaintiffs also claim that the trial court erred in the form of special questions submitted to the jury.

The jury was provided with two alternative verdict forms, which stated:

We, the jury, unanimously find that connection of old technology aluminum wire to an electrical device caused the fire at the Beverly Hills Supper Club on May 28, 1977.

We, the jury, unanimously find that connection of old technology aluminum wire to an electrical device did not cause the fire at the Beverly Hills Supper Club on May 28, 1977.

Transcript at 7351-52. As noted earlier, the jury adopted the second statement.

Plaintiffs assert that the trial judge improperly charged the jury because he failed to define causation as a "substantial factor" in bringing about injury. Kentucky law, they assert, requires that the jury be so charged, *e.g.*, *Deutsch v. Shein*, 597 S. W. 2d 141 (Ky. 1980).

Plaintiffs fail to note that the court expressly included such an instruction.³³ We do not think it was necessary for the judge once more to have incorporated the term "substantial factor" in the verdict form, having carefully instructed the jury in that regard already. It might have been preferable to have done so, and we would see no harm on remand if the trial judge should incorporate such language. The trial judge may decide to revise the form in such a way as to meet the approval of all parties. Again, the question is properly within the discretion of the trial judge.

V

No other errors asserted by the plaintiffs merit extended discussion. The court did not err in permitting the employment of external portions of a model of the north wall. It was not found to be inaccurate, and it was used for demonstrative purposes by both plaintiffs and defendants. It further was not error for the trial judge to preclude the plaintiffs on rebuttal from eliciting proof that the

³³The trial judge instructed the jury as follows:

In order for the plaintiffs to prevail, they must establish by a preponderance of the evidence that the fire was caused by the connection of old technology aluminum wire to electrical devices. This is known as causation.

The connection of old technology aluminum wire to electrical devices is a cause of the fire at the Beverly Hills Supper Club if it was a *substantial factor* in bringing about such fire.

Transcript at 7350 (emphasis added).

interior construction of the model did not conform to the actual construction of the wall. Because the parties learned of the inaccuracies early in trial, the judge never allowed the jury to view the interior of the model. It would not have aided the jury's consideration at all to have expanded the proofs further by developing this irrelevant information.

Neither did the trial court err in permitting cross-examination of Thomas McClory regarding numerous fire code violations found in the Beverly Hills Supper Club. McClory offered an opinion on the cause of the fire, thereby making other potential causes an appropriate subject of cross-examination. Similarly, Mr. Horton's testimony regarding fire and smoke in another room of the club was relevant to whether the fire originated in the north wall and was properly admitted.

Finally, the plaintiffs assert that defense counsel was guilty of at least six instances of improper remarks during closing arguments. We deem it unnecessary to comment on any of these. They are unlikely to recur at retrial, at least in their original form. Suffice it to say that nothing called to our attention would have warranted reversal. Much of that complained of was responsive to equally robust argument by opposing counsel.

VI

In their cross-appeal, the defendants assert that the trial court erred in denying their motion to dismiss and for partial summary judgment on the basis that the action was barred by Ky. Rev. Stat. Ann. § 413.135 (Baldwin). That statute, referred to as Kentucky's "no action" statute, was enacted in 1966 and provides in part as follows:

- (1) No action to recover damages, whether based upon contract or sounding in tort, resulting from or

arising out of any deficiency in the design, planning, supervision, inspection or construction of any improvement to real property, or for any injury to property, either real or personal, arising out of such deficiency, or for injury to the person or for wrongful death arising out of any such deficiency, shall be brought against any person performing or furnishing the design, planning, supervision, inspection or construction of any such improvement after the expiration of five years following the substantial completion of such improvement.

The Supper Club was substantially rebuilt in 1970 and 1971 following a previous fire in 1970. According to the evidence at the trial, no significant improvements were made to the Supper Club since that time. If controlling, section 413.135 would bar any claim resulting from allegedly defective materials installed before June 2, 1972, five years before the first complaint was filed.³⁴ On the other hand, if section 413.135 does not apply, the action would be timely as all claims were commenced within one year of the fire as required by the general tort statute of limitations *See* Ky. Rev. Stat. Ann. § 413.140(a)(1) (Baldwin). Because the improvements occurred in 1970 and 1971, plaintiffs' claims against these defendants are time-barred if section 413.135 is applicable, and an alternate basis for affirmance would exist.

The trial judge denied defendants' motions, finding the statute did not apply to those providing materials for construction projects. He determined that the statute should be narrowly construed because application of the statute would work a harsh result on those whose claim was barred

³⁴There were numerous complaints filed by several plaintiffs against several defendants following June 2, 1977. Because those complaints were filed later, those suits similarly would be barred.

without notice, and because the class of persons to whom the statute applies is uncertain.³⁵ Since the judge did not view defendants as among the class of persons either named or intended to be protected by the statute, he found it unnecessary to decide whether the statute was offensive to Ky. Const. §§ 14, 54 and 241. At least at this juncture of the proceedings, we agree with the result reached by the trial judge, but not necessarily with his reasoning.

The Kentucky courts have not considered whether "materialmen" who design products for construction projects are within the contemplation of the statute. Where state law is unclear, we must "make a considered 'educated guess'" as to how Kentucky courts would view the statute. *Ann Arbor Trust Co. v. North American Co.*, 527 F. 2d 526 (6th Cir. 1975).

We are not nearly so confident as the trial court that the statute ought to be narrowly construed. The statute requires that "[n]o action to recover damages . . . arising out of any deficiency in the design . . . of any improvement to real property . . . shall be brought against *any*

³⁵The judge determined that the statute should be read narrowly in order to avoid the constitutional question raised in *Saylor v. Hall*, 497 S. W. 2d 218 (Ky. 1973). A narrow reading of the statute to exclude materialmen may raise another constitutional problem. As the judge noted, section 413.135 creates immunities. Some state courts have found that creation of statutory immunities in favor of contractors while excluding materialmen from similar protection violates state equal protection guarantees. See *Pacific Indemnity Co. v. Thompson-Yeager, Inc.*, 260 N. W. 2d 548 (Minn. 1977). But see *Carter v. Hartenstein*, 455 S. W. 2d 918 (Ark. 1970). This dilemma makes the argument for narrow construction less compelling.

person performing or furnishing the design" Ky. Rev. Stat. Ann. § 413.135(1) (Baldwin) (emphasis added).³⁶ Whether or not we may agree with the results, we cannot alter the language of the statute, which by its terms covers all persons furnishing such designs.

If that language is plain and unambiguous its meaning should be upheld as so expressed, uninfluenced by any unwise or unusual result that might follow the upholding of the plainly expressed writing or statutes. . . .

Reynolds Metal Co. v. Glass, 195 S. W. 2d 280, 283 (Ky. 1946).

Plaintiffs urge that the statute must be interpreted in light of its purpose, which was to protect those in the building industry from unlimited liability following collapse of the rule requiring privity of contract to recover.³⁷ See generally Comment, *Limitation of Action Statutes for Architects and Builders—Blueprints for Non-action*, 18 Catholic U. L. Rev. 361 (1969). The Kentucky Court has suggested that "the intention to be gathered from employed language is one that it plainly expresses, and not the one that may have been in the mind of the composer, but which he failed to express." *Reynolds, supra*, 195 S. W. 2d at 832. See also *Kentucky Ass'n of Chiropractors, Inc. v. Jefferson County Medical Soc'y*, 549 S. W. 2d 817 (Ky. 1977)

³⁶As used in the statute, "person" means "an individual, corporation, partnership, business trust, unincorporated association or joint stock company" Ky. Rev. Stat. Ann. § 413.135(5) (Baldwin).

³⁷Kentucky rejected the defense of privity of contract and the general rule of manufacturer non-liability as early as 1956 in *C. D. Herme, Inc. v. R. C. Tway Co.*, 294 S. W. 2d 534 (Ky. 1956). See also *Allen v. Coca-Cola Bottling Company*, 403 S. W. 2d 20 (Ky. 1966).

(intention ascertained from words employed in enacting the statute, not by surmising what was intended but not expressed). We see no evidence in the language of the statute indicating an intent to exclude materialmen from protection of the statute.

It is therefore our "educated guess" that a Kentucky Court would disagree with those cases reviewing similar statutes which held that materialmen were not covered by such statutes. *See e.g., Kittson City v. Wells, Denbrook & Assoc., Inc.*, 241 N. W. 2d 799 (Minn. 1976). Review of this history of similar "no action" statutes in several states and in Kentucky itself discloses no reason to exclude materialmen from the statute's coverage. The general trend to eliminate privity as a requirement of an action for breach of implied warranty or for negligence opened a broad new field of potential liability.³⁸ Additionally,

³⁸The Kentucky legislature evidenced further its intention to protect defendants against what it viewed as unlimited liability when it promulgated its Product Liability Act in 1978. Ky. Rev. Stat. Ann. § 411.300 *et seq.* (Baldwin). The purpose of the Act is indicated in the preamble to the Senate Bill, which provides:

WHEREAS, in recent years there has been an increasing public awareness of a need for safer products for the consumer with a resulting increase in the size and number of product liability claims, and

WHEREAS, this dramatic increase of product liability claims is causing an increase in the cost to the consumer of purchasing products, and an increase in the cost of manufacturing, wholesaling, retailing, and insuring said products, and

WHEREAS, a portion of said increased costs is caused by the absence of clear legal precedents and guidelines which govern the rights and liabilities of consumers, manufacturers, wholesalers, retailers, and insurers in the litigation of product liability claims, and

(Footnote continued on following page)

courts found that a cause of action did not arise, nor did the statute of limitations commence to run, until plaintiff was injured. Engineers, contractors and architects were thus confronted with potential liability for conduct which may have occurred many years earlier, well after any opportunity to provide a reasonable defense or to have preserved any evidence had passed. *See generally* Comment, *supra*, 18 Catholic L. Rev. 361. Consequently, those groups strongly urged adoption of "no-action" statutes pertaining to improvements to realty. Because those designing parts intended to become part of the realty were affected similarly by these changes, it can safely be assumed absent exclusionary language that they are protected.³⁹

(Footnote continued from preceding page)

WHEREAS, it is in the interest of the public, consumers, manufacturers, wholesalers, retailers, and insurers, for the General Assembly to codify certain existing legal precedents and to establish certain guidelines which shall govern the rights of all participants in product liability litigation

Senate Bill No. 119 (June 17, 1978). *See also* Ky. Rev. Stat. Ann. § 413.120(14) (precluding action against "builders of a home or other improvements" more than five years after improvement).

It should be noted that we are not persuaded that section 413.300 is contradictory to section 413.135 as plaintiffs assert, their argument being that the former section is superfluous if the latter applies to materialmen. Section 413.135 applies only to constructions of real estate; it does not apply to manufacturers of personal property.

³⁹Considering a similar statute, the New Jersey court stated:

As best we can perceive, the intent of the language of the statute was to protect those who contribute to the design, planning, supervision or construction of a structural improvement to real estate and those systems, ordinarily mechanical systems, such as heating, electrical, plumbing and air conditioning, which are integrally a normal part of that kind of improve-

(Footnote continued on following page)

Assuming that Kentucky's "no action" statute was intended to extend to a class of persons including defendants, we must consider whether Kentucky would view this statute as consistent with Ky. Const. §§ 14, 54 and 241. We believe it would not.

The Kentucky Supreme Court considered the constitutional defects of section 413.135 in *Saylor v. Hall*, 497 S. W. 2d 218 (Ky. 1973). In *Saylor*, the court declined to apply section 413.135 to bar suit against a homebuilder for personal injuries caused by defects in construction where construction occurred before the statute was passed. The court noted that several state courts have considered similar statutes to be valid. It also observed that our court in *Lee v. Fister*, 413 F. 2d 1286 (6th Cir. 1969), had applied the Kentucky statute without considering the effect of several Kentucky constitutional provisions upon its validity. *Saylor, supra*, 497 S. W. at 2d at 222.

The Kentucky court then determined that the Kentucky constitution required a different analysis than that undertaken in other states. It found that the Kentucky constitu-

(Footnote continued from preceding page)

ment, and which are required for the structure to actually function as intended.

Brown v. Jersey Central Power & Light, 394 A. 2d 397, 405 (N.J. 1978).

In this connection, it should be noted that whether a design is an "integral" part of a structure is not relevant to whether a certain class is protected as plaintiffs suggest; rather, it concerns whether the design is an "improvement" to realty. It would be difficult to argue that an electrical system is not an "improvement," which is defined as "a permanent and necessary part of the building." *Menne v. American Radiator Co.*, 150 Ky. 151, 150 S. W. 24, 25 (1912).

tion precludes the legislature from abolishing common law rights of action for injuries or death caused by negligence.⁴⁰

⁴⁰The Kentucky court reasoned:

Our state Constitution, however, has been held to prohibit the legislative branch from abolishing common-law rights of action for injuries to the person caused by negligence or for death caused by negligence. . . .

Section 14 of the Constitution of Kentucky states:

"All courts shall be open and every person, for an *injury* done him in his lands, goods, *person* or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

This section was held to apply to the legislative branch of government as well as to the judicial in *Commonwealth v. Werner*, Ky., 280 S.W. 2d 214 (1955). Section 54 of the same Constitution states:

"The General Assembly shall have no power to limit the amount to be recovered for *injuries resulting in death* or for *injuries to person* or property." The Kentucky Constitution in Section 241 states:

"Whenever the death of a person shall result *from an injury inflicted by negligence* or wrongful act, then, *in every such case*, damages may be recovered for such death from the corporations and persons so causing the same.

. . .

This court construed section 241 in 1911 to mean that ". . . it is not within the power of the legislature to deny this right of action. The section is as comprehensive as language can make it. The words 'negligence' and 'wrongful act' are sufficiently broad to embrace every degree of tort that can be committed against the person. . . ." *Britton's Adm'r v. Samuels*, 143 Ky. 129, 136 S.W. 143.

Saylor v. Hall, 497 S.W. 2d 218, 222 (Ky. 1973) (emphasis in original).

Kentucky has applied these constitutional requirements in other contexts. See, e.g., *Ludwig v. Johnson, et al.*, 243 Ky. 534, 49 S.W. 2d 347 (1932) (guest statute).

The court noted that a cause of action does not accrue until the time of injury. It concluded that, because section 413.130 could cut off a common law right to recovery before a cause of action even accrues, it violated Ky. Const. §§ 14, 54 and 241. The court stated:

The statutory expressions as they relate to actions based on negligence perform an abortion on the right of action, not in the first trimester, but before conception.

Salyor, supra, 497 S. W. 2d at 224.

The court took care to write narrowly and to limit its holding to the particular facts of that case. It is thus possible to limit *Salyor* to those cases where construction occurred before the statute was promulgated. We think the more reasonable interpretation of *Salyor*, however, is that it applies to the present case, even though improvements to the club were made following promulgation of the statute. If the statute were applied to bar plaintiffs' claim, it would have cut off their right of suit before it accrued. We thus find the *Salyor* rationale applicable here.⁴¹

⁴¹A decision of an intermediate appellate court in Kentucky applying a medical malpractice statute of limitations without discussion of the potential constitutional infirmities outlined by the Kentucky Supreme Court (formerly the Kentucky Court of Appeals) does not convince us that the vitality of *Salyor* is in doubt, as defendants suggest. See *Ferguson v. Cunningham*, 556 S. W. 2d 164 (Ky. App. 1977). We note that the Kentucky Supreme Court more recently has reiterated the proposition in *Salyor* that a "cause of action does not exist until the conduct causes injury that produces loss or damage." *Louisville Trust Co. v. Johns-Manville Products*, 580 S. W. 2d 497 (Ky. 1979) (Reed, J.), quoting *Salyor v. Hall*, 497 S. W. 2d 218, 225 (Ky. 1973) (applying "discovery rule" to actions for injury from latent disease).

This case demonstrates once more the fundamental problem federal courts encounter in diversity cases. Jurisdiction conferred upon them by act of Congress forces upon the federal courts decisions of uniquely state law, which they are ill-equipped to render in any authoritative way. Thus, in the absence of any authoritative decision of the Kentucky Supreme Court on this issue, we are left with only the ability to guess what that court would do, given its limited rulings in *Saylor*. Upon the basis of that rationale, we conclude that, were it faced with the circumstances of this case, the Kentucky Supreme Court would probably rule the entire statute violative of the above cited Kentucky constitutional provisions. We therefore conclude that the trial judge's denial of the motions for partial summary judgment and for dismissal on this issue was proper, and we are unwilling to affirm judgment for defendants on this alternative basis.

To recapitulate, it is our tentative conclusion that the trial judge in this case did not err in refusing to apply the Kentucky "no action" statute. We are of the opinion that it is doubtful that the statute ought to be narrowly construed given language of the statute and the history of such legislation generally. We are nonetheless tentatively of the opinion that the Kentucky constitution precludes application of the statute to bar suit against defendants, as it would have extinguished a common law right of action before injury and before plaintiffs had any reasonable opportunity to seek redress in court. Absent any further expression on the subject by the Kentucky Supreme Court, or an authoritative decision by an intermediate appellate court, it would be our opinion that the statute should not apply. If the Kentucky courts render an authoritative decision bearing upon the question while this case is open, the district court remains free to reconsider its position both in the

light of that change and of any changes in the posture of the case on remand.

CONCLUSION

Our decision to reverse is most regretfully made, as the length of time it has taken to reach it may suggest. The trial was generally a fair one, vigorously and effectively presented by able counsel before a skillful and experienced trial judge who cannot be faulted for the events which have occasioned the reversal. We are mindful of the trial judge's observation, earlier stated in an unpublished opinion of this court, that "[e]xperience teaches that while every additional day of trial increases the possibility of error, it correspondingly reduces the risk that any single error may have prejudicial effect upon the ultimate result." *In Re: Beverly Hills Fire Litigation*, C. No. 77-79 (E.D. Ky. April 7, 1980), quoting *United States v. Arvant*, No. 78-5345 (6th Cir. August 27, 1979). Nonetheless, the recited facts of the improper experiment and its use in the jury deliberations are too compelling and too fraught with potential for prejudice to be ignored.

Reversed and remanded.

APPENDIX B

**Nos. 80-3320
80-3358/59/60**

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

IN RE: BEVERLY HILLS FIRE LITIGATION

MARY ELIZABETH KISER, Individually and as
Ancilliary Administratrix of the Estate of
Paul S. Kiser, deceased, Individually and
on behalf of all others similarly situated
hereinafter referred to as the Class (80-
3320/80-3358/59/60,), - - *Plaintiffs-Appellants,*
Cross-Appellees,

BRYANT ELECTRIC (80-3320)

**CADILLAC CABLE CORPORATION, GENERAL ELEC-
TRIC, HATFIELD WIRE, LEVITON, PASS & SEY-
MOUR, JOHN I. PAULDING, REYNOLDS METALS,
SLATER ELECTRIC, AMERICAN INSULATED
WIRE, ETTCO WIRE, MARMON GROUP, RHODE
ISLAND INSULATED WIRE, SQUARE D (80-
3320/80-3358)**

**COLUMBIA CABLE & WIRE COMPANY (80-3320/
80-3359)**

**SOUTH WIRE COMPANY and TRIANGLE PWC
(80-3320/80-3360), - - *Defendants-Appellees,*
*Cross-Appellants.***

ORDER—Filed December 23, 1982

**Before: EDWARDS, Chief Judge; ENGEL, Circuit Judge; and
WEICK, Senior Circuit Judge.***

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the defendants-appellees has been referred to the panel which heard the original appeal.

The petition for rehearing suggests that a recent decision of the Supreme Court of Kentucky in *Fireman's Fund Insurance Company v. Government Employee's Insurance Company*, 635 S. W. 2d 475 (Ky. 1982) provides a definitive answer to the question, tentatively answered in the affirmative in the original panel opinion, whether Kentucky courts would hold Kentucky's "no action" statute unconstitutional. *See* Ky. Rev. Stat. Ann. § 413.135 (Baldwin). Upon consideration the court remains of the opinion that its original conclusion has not been rendered incorrect by the recent decision cited. Justice Palmore, writing for the court in *Fireman's Fund*, determined that a statute limiting the right of a no-fault insurer to indemnity did not violate Sections 14 and 54 of the Kentucky Constitution because no such right existed at the time of the adoption of the Constitution. The court did not purport to overrule *Salyor v. Hall*, 497 S. W. 2d 218 (Ky. 1973), nor did it address the applicability of section 241 of the Kentucky Constitution, which was relied upon both in *Saylor* and in other decisions of Kentucky's highest court. *See Ludwig v. Johnson*, 49 S. W. 2d 347 (Ky. 1932); *In Re: Beverly Hills Fire Litigation*, 80-3320, 80-3358/59/60, slip op. at 34 n. 40 (6th Cir. July 21, 1982).

Even more important, Justice Palmore reaffirmed the validity of *Saylor* in *Ball Homes, Inc. v. Volpert*, 633 S. W. 2d 63 (Ky. 1982), which concerned application of section 413.135 to a suit for breach of an implied warranty of fitness of a new home. He stated:

*Judge Weick took Senior status on December 31, 1981.

In *Salyor*, we were concerned with a negligent tort, and were of the opinion "that there was an existing right of action in this state for the type of negligence claimed in the lawsuit *when the questioned statutes were enacted.*" We held that by reason of Const. Sections 14, 541 and 241 the limitations statutes could not operate to destroy a cause of action before it came into legal existence.

Ball Homes, Inc. v. Volpert, supra, 633 S. W. 2d at 64 (citations omitted) (emphasis added). He then found that section 413.135 was constitutional as applied to Volpert's action because no cause of action similar to his existed when the statute was promulgated in 1966. The applicability of the cited provisions of Kentucky's constitution, particularly section 241, as a bar to application here of section 414.135, is thus made increasingly clear as the existing right of action for the type of negligence claimed dates back at least to 1956 (see n. 37, original opinion), ten years before enactment of section 413.135.

While in our opinion Kentucky cases since *Salyor v. Hall* have reinforced our earlier expressed view, we again suggest that the question remains open for any further decision of Kentucky's highest court which would authoritatively dictate a contrary result as a matter of state law. See particularly *In Re: Beverly Hills Fire Litigation, supra*, slip op. at 35-36.

The court finding no other issues presented by the petition which have not already been previously and adequately considered and decided,

IT IS ORDERED that the petition for rehearing en banc be and it is hereby denied.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman
Clerk

APPENDIX C
IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

In Re:
BEVERLY HILLS FIRE LITIGATION
Civil No. 77-79

ORDER—Filed April 7, 1980

INTRODUCTION

This matter is before the Court on the motions of plaintiffs for a mistrial, for judgment notwithstanding the verdict, and for a new trial. In order to put this matter in its proper context, certain background observations should be made.

The lawsuits known collectively as the "Beverly Hills Fire Litigation" involve a class of some two hundred plaintiffs. Approximately one thousand defendants have been involved. The suits arose out of a fire at the Beverly Hills Supper Club in Southgate, Kentucky, on May 27, 1977. Plaintiff class consists of the personal representatives of those persons killed and those injured or the personal representatives of those injured in such fire.

In June of 1978 by Order #74 the defendants were divided for trial purposes into several categories. One of such categories was described as "Manufacturers of Aluminum Electrical Wire and/or Devices designed to be used with aluminum electrical wire and related testing services"

(hereafter Aluminum Wire defendants). At that time there were 31 defendants listed in such category.

On December 3, 1979, when trial commenced against the Aluminum Wire defendants there remained 22 defendants in the group and 19 defendants by February 20, 1980 when the matter was submitted to the jury. Prior to the presentation of testimony the Court in accordance with Rule 42(b) of the Federal Rules of Civil Procedure directed in Order #238 that "evidence on the issue of causation be separately presented to the jury for determination before any other issue is submitted."¹

Thirty-two trial days were required for the presentation of evidence: 17 by the plaintiffs; 13 by the defendants; and 2 by the plaintiffs in rebuttal. In excess of 7300 pages of transcript were required to record the proceedings. Over 22,500 items of evidence were initially submitted for use during the trial and 281 were admitted for consideration by the jury. The items of evidence varied in size from a 10' x 16' mock-up of the north wall of the Zebra Room of the Beverly Hills Supper Club (Ex. 400, 529) to a 1/8th inch sliver of aluminum wire (Exhibit #5200A). By way of description, exhibits included thousands of pages of documents, electrical receptacles, connections, conduit, fixtures, salvaged artifacts, charts, drawings, diagrams, and demonstrative evidence prepared by experts to explain their respective testimony. All exhibits followed a numbering sequence whereby plaintiffs' exhibits began with odd numbers and defendants' exhibits began with even numbers. Some, but not all, of the defendants had pre-

¹Order #238 is dated December 12, 1979. The commencement of trial on December 3, 1979 involved only the selection of a jury. Opening statements were not made until December 10, 1979. Prior to the commencement of opening statements counsel were verbally advised of the Court's ruling on the causation issue (T. 252-254). Order #238 is attached as Appendix A.

pared separate lists of exhibits and there was an inevitable overlap therein.

During the entire trial the plaintiffs were represented by a team of five lawyers and the defendants by separate counsel whose presence in the courtroom varied from 17 to 30. So numerous were defense counsel that half of the spectator benches in the courtroom were removed in order that adequate space might be provided for their use. Early in the trial defendants adopted the procedure of seating four or five lawyers in the well of the court and the balance in the spectator section. Different defense counsel were assigned different portions of the trial and it was the counsel assigned specific responsibility for a given witness who sat in the well of the court while he testified.

An initial attempt by the Court to limit objections to "designated objectors" and bench conferences to "designated bench conferees" proved immediately unsatisfactory and the plan was dropped. Any defense attorney could object at any time and as many defense counsel as desired could attend bench conferences. Throughout the trial the plaintiffs enjoyed the advantage of a small cohesive team while the defendants frequently had the differences of opinion that would be expected among experienced and exceptionally able trial counsel.

The foregoing is intended only as a description of courtroom logistics in a highly technical, complex and prolonged trial. It is significant to a consideration of the plaintiffs' asserted errors in view of the following statement by The Honorable Albert Engle speaking for a unanimous panel of the United States Court of Appeals for the Sixth Circuit in *United States of America v. William L. Arvant*, No. 78-5345 (unpublished), filed August 27, 1979. Judge Engle stated "Experience teaches that while every additional day of trial increases the possibility of error, it

correspondingly reduces the risk that any single error may have prejudicial effect upon the ultimate result."

Plaintiffs seek either a mistrial, judgment notwithstanding the verdict, or a new trial. For the reasons stated hereafter, each of said motions is hereby DENIED.

The substantive issues raised by plaintiffs will be dealt with in the following order:

I JUDGMENT NOTWITHSTANDING THE VERDICT

II MOTION FOR A NEW TRIAL

- (A) Extraneous prejudicial information brought to the jury's attention;
- (B) Bifurcation of the issue of causation from plaintiffs' causes of action;
- (C) Prejudicial remarks of opposing counsel;
- (D) Erroneous admission of evidence by the Court;
- (E) Exclusion of evidence;
- (F) Erroneous charges to the jury;
- (G) Verdict contrary to the weight of the evidence;
- (H) Failure to reveal identities of the defendants;
- (I) Failure of the Court to conduct voir dire as requested by the plaintiffs.

III. MOTION FOR MISTRIAL.

I

JUDGMENT NOTWITHSTANDING THE VERDICT

Plaintiffs seek judgment notwithstanding the verdict despite a clear inability to satisfy the test used in this circuit. Recently the United States Court of Appeals for the Sixth Circuit in the case of *Woodruff v. Tomlin, Jr.*, — F. 2d —, (No. 77-1216, Feb. 21, 1980) made the following observation:

Review of a judgment n.o.v. is governed by the same rule which applies to an appeal from a directed verdict granted at the close of all the evidence. We are required 'to view the evidence as well as all inferences properly deducible therefrom in the light most favorable [to the successful party]' *Campbell v. Oliva*, 424 F. 2d 1244, 1245 (6th Cir. 1970). a judgment n.o.v. should not be granted 'unless the evidence is such that there can be but one reasonable conclusion as to the proper verdict.' *Reeves v. Power Tools, Inc.*, 474 F. 2d 375, 380 (6th Cir. 1973).

A review of the evidence in this case does not establish "but one reasonable conclusion" as to the proper verdict. The jury reached its conclusion supported by substantial probative evidence in the record.

II

MOTION FOR A NEW TRIAL

(A) Extraneous Prejudicial Information Brought to the Jury's Attention

1. Alleged Juror Misconduct

It is asserted by the plaintiffs that a member of the jury made an investigation of and experimented upon aluminum branch circuit wiring in his own home and communicated the results of his experiment to other members of the jury. Rule 606(b) of the Federal Rules of Evidence bars an inquiry into ". . . any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon [a juror's] or any other juror's mind or emotions as influencing [a juror] to assent to or dissent from the verdict . . . or concerning [a juror's] mental processes in connection therewith. . . ." The rule

does permit testimony on the question of "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror . . ."

Both Rule 606(b) and decisions in this circuit suggest a judicial inquiry under appropriate circumstances. Neither counsel nor this Court have found decisions in this circuit on the precise issue in question. The nature of the inquiry can only be extrapolated from decisions that are not quite in point but bear upon interrogation of jurors.

In *Krause v. Rhodes*, 570 F. 2d 563 (6th Cir. 1977), it was held to be error for the trial court to determine ex parte and without any personal interrogation that a juror who had been threatened and assaulted could continue to serve unaffected by those incidents.

In suggesting the proper procedure the Court stated:

The threatened juror should have been questioned by the Court to hear his version of the reported incidents and to learn whether he had discussed them with other jurors . . ." *supra* at 569.

In *United States of America v. Brown, et al.*, 571 F. 2d 980 (6th Cir., 1978), the Court approved in a criminal case an in-chambers conference regarding the dismissal of a juror where counsel were present and defense counsel were able to raise questions regarding such dismissal.

In *Standard Alliance Industries v. Black Clawson Co.*, 587 F. 2d 813 (6th Cir. 1978) the Court considered a situation involving asserted improper jury contact.² The Court made the following statement:

²The determination of the Court may be considered as instruction to trial judges faced with the same problem in view of the following introductory statement by the Court: "Although unnecessary to our decision, an additional issue warrants mention." *Supra* at 828.

The correct response of a trial judge when confronted with allegations of improper jury contact is to give notice to the parties and to question the jurors on the record about any alleged incident.

Supra at 828.

None of the above cases dealt with a discharged jury and the plain terms of Rule 606(b) must be construed as a limitation upon any inquiry. It has long been a principle of American Jurisprudence that jurors deliberate in secrecy and their reasons for reaching a verdict are their own.

The underlying principle regarding the nature of a judicial inquiry in matters of this sort has been suggested in *Gault v. Poor Sisters of St. Francis Seraph of the Perpetual Adoration, Inc.*, 375 F. 2d 539 (6th Cir. 1967).

. . . We need not rule upon the propriety of a defeated litigant's entry into an inquisition of a jury's deliberation as was done here. We announce no general rule on the matter but express our view that *Generally jurors should not be exposed to such intrusion* (emphasis added).

Supra, at 551.

In an effort to conduct the appropriate limited inquiry and to determine the factual background of plaintiffs' assertions, questions were directed to each discharged juror by the Court on March 7, 1980. Each former juror was questioned in chambers by the Court in the presence of counsel for each side.

The facts obtained from such inquiry indicated that one juror had in the early portion of the trial examined the aluminum wiring in his own home and determined that the binding head screws were tight. It was his recollection that in a general discussion with other jurors one morning

before trial he made this fact known. Six members of the jury panel had no knowledge of his investigation or of his communication with other jurors. Five of the remaining six agreed that this had occurred within the first few days of trial and only one was of the impression that it had been mentioned to her during jury deliberation. All twelve members of the jury panel agreed that no discussion of this investigation was conducted while the jury deliberated together.

In the context of the trial length, the quantity of evidence presented and the number of witnesses called by each side, this action by a juror appears to be of minor consequences and not a sufficient intrusion upon the deliberative process as to require the setting aside of the jury verdict.

The obligation in this circuit upon a trial judge under the above circumstances appears to be a question of the "probability of . . . influence upon the jury's deliberation or verdict." *Stiles v. Lawrie*, 211 F. 2d 188 (6th Cir. 1954). When considered in the context of the totality of this trial this Court considers it not probable that the action of the juror or his communication to members thereof influenced the jury's deliberation or verdict.

2. Inadmissible Evidence in the Jury Room.

It is asserted by the plaintiffs that jurors were permitted to consider the contents of a publication by the National Fire Prevention Association known as "Reconstruction of a Tragedy." While under other circumstances an analysis of such publication might be necessary in order to determine whether prejudice to the plaintiffs did in fact occur, such an analysis is not necessary in view of the following factual circumstances.

It is clear that nine members of the jury panel saw the publication in the jury room. One read it, three did not,

two "leafed through it," one "looked at it vaguely," one "looked at pictures," and one "looked at it." All twelve agreed that it was not discussed by the jury during deliberation.

The factual background of this matter is as follows: Plaintiffs completed rebuttal testimony on Friday, February 15, 1980. After the jury was excused, the Court advised counsel that there would be a meeting on Monday, February 18, 1980 to consider "the exhibits to be admitted into evidence." (T. 6986). The Court also advised counsel as follows: "Mrs. Anderson [Deputy Courtroom Clerk] will have available very shortly the list of all exhibits that have been displayed to witnesses and which are therefore eligible to be admitted into evidence (T. 6986). The list of exhibits as presented to counsel are attached hereto and marked Appendix B. The Court further advised counsel that "any exhibit that has been used in this trial may be offered into evidence by either side and should the side that used it wish not to admit it and the other side wishes it to be admitted, I will hear from you because its' admissibility does not in my opinion depend upon who offers it . . ." (T. 6986 & 6987).

The list marked Appendix B was distributed to counsel by Mrs. Anderson on February 15, 1980. On the morning of February 18th a conference was held with counsel in the courtroom where all exhibits were displayed. "Reconstruction of a Tragedy" had been referred to during the trial under at least two numbers. Different copies were noted as Plaintiffs' Exhibit 13013 and as Defendants' Exhibit 400,001.

At the conference on February 18, 1980 defendants reviewed plaintiffs' exhibits on an item-by-item basis and made specific objections (T. 6992-7120). At the conclusion of defendants' objections plaintiffs were asked: "Do the plaintiffs have anything that they wish to object to offered by the defendants?" (T. 7120). Mr. Chesley responding

for the plaintiffs questioned "Reconstruction of a Tragedy" under No. 13013 only. The disposition of that exhibit was taken under advisement and during the afternoon of February 18 counsel were advised that the Court considered it inadmissible.

While Exhibit #400,001 is clearly listed on the exhibits proposed by defendants, no question was ever raised at any time regarding that exhibit. At no time has it been suggested that defendants offered this exhibit as a subterfuge and the Court does not so find. In the mass of exhibits present in this case it is clear that it was offered inadvertently. Had the matter been called to the Court's attention, the ruling on Exhibit 400,001 would have been the same as it was on 13013.

The simple fact, however, is that it was plaintiffs who failed to object and by reason of such failure it was included in the list to be considered by the jury. It hardly seems appropriate to grant a new trial to the plaintiffs in a situation created by plaintiffs' omission. See *Miller v. New York Cent. R. Co.*, 1239 F. 2d 10 (7th Cir. 1956).

In view of the unanimous statement of the jurors that it was not a part of their discussion and in the context of the magnitude of trial and the exhibits presented, the Court, in any event, does not consider this to be of sufficient magnitude to warrant the granting of a new trial.

B. Bifurcation On the Issue of Causation

Rule 42(b) of the Federal Rules of Civil Procedure provides in part:

The Court, in furtherance of convenience or to avoid prejudice . . . may order a separate trial of . . . any separate issue . . .

The United States Court of Appeals for the Sixth Circuit has held:

The decision to sever issues is left to the sound discretion of the trial court and its determination should only be reversed for an abuse of that discretion. *Parmer v. National Cash Register*, 503 F. 2d 275 (6th Cir. 1974).

This matter was considered in some detail with oral argument by counsel before presentation of evidence commenced (T. 213-252) and was the subject of both an oral determination from the bench (T. 252-254) and Order No. 238.

C. Prejudicial Remarks of Opposing Counsel

Plaintiffs request a new trial by virtue of certain remarks made by opposing counsel during closing argument. Specifically, plaintiffs allege that the following remarks were made by opposing counsel during final argument and were prejudicial: (1) statements concerning observations by Mrs. Horton and Dee Hall regarding the functioning of the fountain pump; (2) statements referring to certain of plaintiffs' experts who did not testify at trial; (3) statements which insinuated that plaintiffs' trial theory was of recent fabrication; and (4) statements of facts not in evidence. A review of the final argument of defense counsel does not reveal prejudice to plaintiffs, particularly in view of the Court's instructions.

In addition to the foregoing, it should be pointed out that as to the category characterized by plaintiffs as "additional misstatements of facts in evidence, and statements of facts not in evidence," there was no objection by counsel at any time. Only a timely objection preserves this issue for review on a motion for a new trial. See *Hobart v. O'Brien*, 243 F. 2d 735 (1st Cir. 1957), *cert. denied* 355 U. S. 830; *Griffin v. Ensign*, 234 F. 2d 307 (3d Cir. (1956)).

With respect to statements concerning observations by Mrs. Horton and Dee Hall, the following portion of the transcript is pertinent:

Mr. Rose: Now, if in fact the pump was off at the time Mr. Horton, his wife and Deanne [sic] report that it was off, and I believe Mr. Horton and I believe his wife because you recall they explained to you how they placed this time between 8:00 and 8:15—

Mr. Chesley: Objection as to what Mrs. Horton said. She didn't testify.

The Court: I don't believe Mrs. Horton testified.

Mr. Rose: The testimony reflects it.

The Court: I understand, but she didn't testify. The objection will be sustained.

Mr. Chesley: And neither did Deanne [sic] Hall, Your Honor.

The Court: Just a minute. Proceed, Mr. Rose. (T. 7300-7301)

Plaintiffs' objection as to these statements was sustained; plaintiffs did not request a curative jury instruction.

Furthermore, the statements of Mrs. Horton and Dee Hall had been introduced into evidence. The statements of Dee Hall were relied upon by one of defendants' experts, Roger Landers. As such, these statements were a proper basis for expert testimony under Federal Rule of Evidence 703 (T. 5793, 5798). The statements of Mrs. Horton were elicited during plaintiffs' examination of Mr. Horton (T. 4215, 4216). Therefore, there was a factual predicate in the record for defendants' final argument concerning statements by Mrs. Horton and Dee Hall.

As to statements referring to plaintiffs' experts who did not testify, two observations are necessary: first, this tactic was employed by both parties during final argument; and

secondly, this line of argument is not necessarily improper. See *Chesapeake & O. Ry. Co. v. Richardson*, 116 F. 2d 860 (6th Cir. 1941), *cert. denied*, 313 U. S. 574 (1941).

Finally, those statements which plaintiffs allege insinuated that plaintiffs' trial theory was of recent origin also are not prejudicial. Defendants' closing argument on this point stated facts in evidence and left to the jury any reasonable inference which could be drawn. One such inference is that plaintiffs did not arrive at their trial theory with respect to these defendants until October 12, 1979. As long as such inference is supportable by the facts it is not improper argument. *Chesapeake & O. Ry. Co. v. Richardson*, *supra*.

Without so finding, the Court notes that even "remarks . . . in extremely poor taste and obviously designed to prejudice the jurors" may not be so prejudicial as to require a new trial [taken] in the context of the entire record and in view of the curative instructions by the District Judge . . ." *Smith v. Travelers Ins. Co.*, 438 F. 2d 373, 375 (6th Cir. 1971), *cert. denied* 404 U. S. 832, 1971.

Both orally before argument commenced (T. 7157) and in specific instructions thereafter the jury was advised the statements of counsel were not evidence and were to be disregarded by the jury as such.³

³The following appears at p. 7157 of the transcript: "We have finally reached that point, ladies and gentlemen, where counsel may now address you in what is referred to sometimes as summation, sometimes as final argument. The terms are used interchangeably, but it may be that the term final argument is a bit more descriptive because that is what this is. This is argument. All of the evidence in this case has been presented to you prior to today. Nothing that counsel may say may be considered by you as evidence." Charge 5003 contains the following: "The following are not evidence and must be entirely disregarded by you as evidence: 1. Opening statements and final arguments by counsel." (T. 7343).

D. Admission of Erroneous Evidence

Plaintiffs contend that the Court erred in admitting the following items of evidence: (1) the mock-up of the north wall of the Zebra Room (Ex. 400,529); (2) the testimony of Thomas McClory on cross-examination regarding code violations; (3) the admission of "Reconstruction of a Tragedy" (Exhibit 400,001); and (4) the testimony of Eugene Horton.

(1) Perhaps the most useful piece of evidence in the entire case was the large mock-up of the north wall of the Zebra Room of the Beverly Hills Supper Club. Its physical presence dominated the courtroom throughout the entire trial and scarcely a witness called by either side failed to utilize it in giving testimony. Plaintiffs did not object to its presence in the courtroom and raised no question regarding the accuracy of its outward appearance. Late in the trial plaintiffs learned that the interior construction of the wall was inaccurate and it is upon that inaccuracy that the objection is based. This matter was thoroughly argued by plaintiffs' counsel (T. 5693-5700) and the Court determined that the wall had never been represented to the jury as anything other than a surface replica of the Zebra Room and that the construction behind the surface was not relevant to their consideration. At no time was the jury shown the interior construction of the wall and the interior inaccuracy, if any, was not a matter of their deliberations. Plaintiffs were permitted to introduce an Exhibit No. 5307, which did demonstrate a cross-section of the wall as plaintiffs asserted it to be and argument was made on the significance of such construction (T. 7171, 7175, 7191).

It seems less than appropriate for litigants to permit without objection a large exhibit to remain in the courtroom in full view of the jury during a long trial, to use that exhibit repeatedly by their witnesses, and then to complain

that the exhibit is inaccurate in its interior, which was neither shown to nor testified about by any defense witness.

2. The interrogation of Mr. McClory regarding code violations in the Beverly Hills Supply Club was appropriate to the issue of causation. Plaintiffs conceded at the outset that their case was based upon circumstantial evidence. If a witness may testify in this regard, it would seem only fair that he be cross-examined regarding other causes of the fire which might include by way of example workmanship below safety standards and improper wiring. Mr. McClory was an expert witness for the plaintiffs and gave his opinion as to the cause of the fire. The cross-examination in question tested that opinion and left to the jury the ultimate determination of the fact issue which had been presented for their consideration.

3. "Reconstruction of a Tragedy" has been dealt with in some detail in subsection IIA of this order. While it does not bear on the failure of plaintiffs to object to the admission of Reconstruction of a Tragedy as Exhibit No. 400,001, it should be pointed out that it was plaintiffs who initially brought portions of the report to the jury's attention. Plaintiffs' counsel quoted from page 98 of the report (T. 4336 and 4330), from page 57 of the report (T. 4340), and sought to display on a screen pages 57 and 98 to the jury (T. 4344). At a bench conference, the Court pointed out that it had previously ruled portions of the exhibit were not admissible. Counsel for plaintiffs replied: "You held that was not admissible because they hadn't made it a business record. Now they have made it a business record." The Court: "O.K. Can I ask what is the status of this document? Is either side proposing to offer it into evidence?" Plaintiffs' counsel: "They have offered it, Your Honor." (T. 4346).

Plaintiffs' counsel proceeded to project on a screen portions of the document (T. 4350).

The record is clear that the copy of "Reconstruction of a Tragedy" used by plaintiffs on cross-examination was Exhibit No. 400,001 and not Exhibit 13013. Any assertion by plaintiffs that they were not aware of Exhibit 400,001 is simply not supported by the record.

4. Eugene Horton, a witness called by the defendants, testified regarding smoke and flame in the Cabaret Room (T. 4204). Since plaintiffs asserted throughout the trial that the fire commenced in the north wall of the Zebra Room and presented evidence regarding smoke and heat in that area as proof, similar evidence regarding fire origin in another area would seem to be appropriate defense. The logical conclusion of plaintiffs' position would seem to be that the testimony of a plaintiff witness regarding the location of smoke and heat is admissible, but contradictory evidence as to location by a defense witness is not.

The testimony of Mr. Horton was pertinent to the issue of causation and the conflict between his testimony and that of plaintiffs' witnesses was a matter for determination by the jury.

E. Exclusion of Evidence

Plaintiffs next object to the exclusion by the Court of certain documents and testimony. In particular, plaintiffs contest the Court's ruling with respect to the following: (1) documents submitted to the Court by plaintiffs on December 12 and 13, 1979; (2) the Krawiec deposition; and (3) Cilwa rebuttal testimony.

1. Documents submitted December 12 and 13.

On December 12 and 13 of 1979, plaintiffs submitted to the Court twenty-five (25) documents for a determination of admissibility. No foundation was laid by plaintiffs for any of these documents. The Court directed that briefs be

submitted and oral argument conducted on the question of admissibility. After a Christmas recess from December 21, 1979 to January 2, 1980, the Court ruled on the admissibility of these documents by Order 253 dated January 7, 1980 (Appendix C). In this order the Court held certain documents to be inadmissible as irrelevant to the targeted issue; portions of other documents were held to be relevant and admissible; and certain documents were held to be conditionally admissible upon the establishment of a proper foundation. No subsequent argument of plaintiffs has demonstrated any error in Order 253.

2. Krawiec's Deposition.

Plaintiffs charge that exclusion of portions of Krawiec's deposition was error. These portions were excluded as either hearsay or irrelevant to any fact of consequence. In addition, portions of this deposition were cumulative. Further discussion does not appear necessary.

3. Cilwa Rebuttal Testimony.

After a voir dire examination of Mr. Cilwa (T. 6475-6498) the Court determined to exclude his rebuttal testimony for two reasons: first, the testimony of Mr. Cilwa was not proper rebuttal testimony; secondly, his testimony was not relevant.

The scope of proper rebuttal testimony is strictly limited to that evidence which is necessary to rebut what was new in the evidence of the defense. *Sanchez v. Safe-way Stores, Inc.*, 451 F. 2d 998 (10th Cir. 1971); *Bowman v. General Motors Corp.*, 427 F. Supp. 234 (E.D. Pa. 1977). Mr. Cilwa's testimony, as revealed by the voir dire examination, would not have been directed to a subject brought out during defendants' case in chief. The determination of what constitutes appropriate rebuttal is a matter within

the discretion of the Court. *Skogden v. Dow Chemical Co.*, 375 F. 2d 692, 705 (8th Cir. 1967).

The voir dire indicated that Mr. Cilwa would testify to the accuracy of the interior of the north wall mock-up (Exhibit 400,529). Since the interior of the exhibit was never opened to the jury, this subject was not relevant to a fact of consequence. See Federal Rules of Evidence 401 and 402.

F. Instructions to the Jury

Plaintiffs contend that the instructions to the jury were in error because (1) the Court did not charge on "substantial factor"; and (2) the word "claims" used in Charge 5002.4 should have been "claim" and the word "elements" should have been "element." Plaintiffs' first contention is inaccurate; the second is trivial.

As to the charge on causation, the Court did instruct the jury on the "substantial factor" test. Instruction 5701-K contains the following:

The connection of old technology aluminum wire to electrical devices is a cause of the fire at the Beverly Hills Supper Club if it was a substantial factor in bringing about such fire. (T. 7350).

The assertion on "claims" and "elements" warrants little discussion. The underlying consideration of jury instructions may be found in *Laugeson v. Anaconda Co.*, 510 F. 2d 307 (6th Cir. 1975). At p. 315, the Court stated: "If the judge's instructions properly present the issues and the law as applicable, it is no ground for complaint that certain portions taken by themselves and isolated may appear to be ambiguous, incomplete or otherwise subject to criticism." The instruction given was neither a misstatement of the law nor prejudicial to the plaintiffs. See *South-East*

Coal Company v. Consolidation Coal Company, 434 F. 2d 767 (6th Cir. 1970), *cert. denied* 402 U. S. 983 (1971).

G. Verdict Was Contrary to the Clear Weight
of the Evidence

This assertion of plaintiffs may be disposed of summarily. Just as plaintiffs are not entitled to a judgment notwithstanding the verdict (See Section I above), so plaintiffs are not entitled to a new trial on this issue. By general rule, the granting of a new trial is a matter purely within the discretion of the trial court. *Hopkins v. Coen*, 431 F. 2d 1055 (6th Cir. 1970). The verdict of the jury is supported by substantial, probative and convincing evidence. It is not the function of the Court to substitute its judgment as to the weight and sufficiency of the evidence for that of the jury. *Duncan v. Duncan*, 377 F. 2d 49 (6th Cir. 1967); see also Federal Rule of Civil Procedure 61.

H. Failure to Reveal to the Jury the
Identities of Defendants

Plaintiffs contend that the Court erred in failing to reveal to the jury the identities of the defendants. This contention is a misstatement of what occurred at trial and a misapprehension of the reasons behind the restriction.

Correctly stated, each defendant was identified by name to the jury when counsel were introduced (T. 47-61). Additional references to named defendants were made throughout the course of the trial. See e.g. Underwriters Laboratories (T. 278, 296, 329, 333, 335, 369), Hatfield (T. 281), Kaiser (T. 297, 298, 300), General Electric (T. 298, 299, 300), Bryant Electric (T. 334), Leviton (T. 376).

The reason for the restriction on reference to particular defendants during this phase of the trial was to effectuate the determination to sever and try first the issue of causa-

tion. (Order 238). Had plaintiffs prevailed on the issue of causation the question of whether defendants acted in concert or by conspiracy in producing and promoting a defective product would have next been considered by the jury.

The restriction on references to particular defendants served the purpose of separating the issue of causation from the issue of conspiracy. Causation was a matter of proof as to inanimate wire and not as to any manufacturer thereof.

I. Voir Dire

Plaintiffs assert a right to a new trial based upon the Court's refusal to ask certain voir dire questions proposed by them. Such request for a new trial on this ground is hereby denied because (1) the scope and extent of the voir dire examination are matters in the discretion of the Court; and (2) plaintiffs failed to timely object to the voir dire examination.

The scope and extent of voir dire examination are matters addressed to the discretion of the Court. *Eisenbauer v. Burger*, 431 F. 2d 833, 846 (6th Cir. 1973); *Kyzniak v. Taylor Supply Co.*, 471 F. 2d 702 (6th Cir. 1972); 5A *Moore's Federal Practice*, ¶47.06 at 2025.

The parties to litigation are not entitled to a jury of their liking; rather, they are entitled to an impartial jury. Wright & Miller, *Federal Practice and Procedure*, ¶2482 at 467.

The Court conducted its own voir dire examination of the jurors in conformity with Federal Rule of Civil Procedure 47. The questions to the jurors addressed a broad spectrum of areas intended to expose any basis of impartiality. The parties had been provided an opportunity, of which they took advantage, to supply the Court with

suggested questions. The Court's questions were drawn from those supplied. Included in the questions asked was a general question which inquired into any reason why those selected could not serve as fair and impartial jurors. Afterwards, the parties were heard on supplemental questions pursuant to Federal Rule of Civil Procedure 47(a). (T. 96-100 and 108). Plaintiffs offered no supplemental questions. Twenty-six prospective jurors were dismissed during the voir dire process.

Counsel were assisted in exercising preemptory challenges by two sets of questionnaires which had been filled out by the prospective jurors and which provided general informational background including education and employment.

Pursuant to 28 U.S.C. § 1870, parties were allowed 12 additional preemptory challenges per side in addition to three provided by statute for the regular jury, and 3 challenges per side for the six alternates. During this process thirty-six additional prospective jurors were dismissed.

Plaintiffs' challenge to the voir dire examination must fail because of plaintiffs' failure to object. Upon completion of the Court's voir dire examination, plaintiffs elected not to voice those additional questions which they now claim the Court failed to ask. In contrast, the defendants did offer suggested, supplemental questions which were considered by the Court (T. 96-100).

Finally, an examination of the proffered questions fails to demonstrate the Court's failure. Any unsuccessful litigant can speculate that a different jury would have reached a different result but this is not the appropriate test. See *Rogers v. DeVries & Co.*, 236 F. Supp. 110 (D.C. Tex. 1964). In the absence of some showing of prejudice from the voir dire examination, plaintiffs' motion for a new trial based on improper voir dire examination should be denied.

III

MISTRIAL

Plaintiffs have moved for a mistrial alleging that prejudicial extraneous information was improperly obtained by a jury member. This motion follows the entry of judgment for defendants.⁴

Plaintiffs' motion for a mistrial is DENIED for two reasons. First, judgment has already been entered in this action and the appropriate request for relief from judgment would be by motion for a new trial or judgment notwithstanding the verdict pursuant to Federal Rules of Civil Procedure 50 and 59. See e.g. *Aluminum Co. of America v. Loveday*, 273 F. 2d 499 (6th Cir. 1957). Plaintiffs' motions for a new trial and judgment notwithstanding the verdict have been previously considered and denied. Secondly, with respect to the specific substantive challenge raised by plaintiffs' motion for a mistrial, this challenge has also been previously addressed and denied. More specifically, it has been determined that the information which reached the jury was either not improper or not prejudicial.

CONCLUSION

A review of the assigned reasons whereby plaintiffs seek to relitigate their case leads inescapably to the conclusion that plaintiffs in fact complain over the absence of a perfect trial. This is the classical posture of unsuccessful litigants who must find some straw to clutch in their quest for a second chance. This position, however, represents a fundamental variation from the traditional posture of a trial in a court of law. A litigant is not entitled to a perfect trial. He is entitled to a fair trial. He is entitled to

⁴Judgment for defendants was entered February 20, 1980.

full consideration of the evidence by a fair and impartial jury, properly instructed in the applicable law.

This Court is unable to determine whether plaintiffs received a perfect trial. Standards of perfection do not exist in the known concepts of American jurisprudence. Standards of fair trial, on the other hand, are discernible in our legal system and by those standards it is clear that plaintiffs did receive their full entitlement.

The motions for mistrial, for judgment notwithstanding the verdict, and for a new trial are each hereby DENIED.

It is so ORDERED.

(s) Carl B. Rubin
Chief Judge
United States District Court

APPENDIX D**TESTIMONY OF JOHN ROLAND VORIES**

39

JOHN ROLAND VORIES, being first duly sworn, testified as follows:

Examination by the Court

Q. O. K., Mr. Vories, it's my understanding that at some time during the trial you checked your electrical system in your home?

A. Yes, I did.

Q. Approximately when did that occur?

A. Sir, the first part of the trial. It come out and they was talking about aluminum wire wired to outlets was like a time bomb; it could go off any time, and they brought out slides and they was showing the outlet glowing and charring and they showed the studs burning; and that's why I went home and checked them that night. I didn't check the aluminum for tests or experiments or to see if it was safe. I was concerned with my family.

Q. O. K. When was your house built? Do you know?

A. In 1969.

Q. Was it built for you or—

40

A. No. They had like seven different models up there, and you could choose from any model, and I got whatever plot of land—

Q. O. K. What I mean is, you have been the only occupant of that house?

A. Yes, sir.

Q. O. K. And when you bought it, had it been under construction or was it still to be constructed or was it finished?

A. It was, I told them what kind of brick and all that stuff, and they built it. When it was finished, they told me it was finished, and that's when I moved.

Q. Mr. Vories, what is your occupation?

A. Refrigeration mechanic for Coca-Cola.

Q. O. K. As such you do work on electrical systems?

A. Not wiring. Like tracing schematics and broken wire in a vendor or ice maker, something like that, but nothing to do with house wiring.

Q. Do you go out on the job and repair refrigeration equipment for them?

A. Yes, in the field, yes.

Q. And this deals with things like compressors?

A. Right.

Q. And other refrigeration equipment?

41

A. Right.

Q. O. K. What did you find when you checked the connections in your home?

A. I didn't find anything. I took my outlets out and I got me a flashlight and I turned my electric off, and I was looking for a receptacle that was charcoaling, like they said.

Q. Yes.

A. And then after I didn't see anything like that, I pulled the thing out and tried to tighten the screws, see if they was tight.

Q. O. K. And what did you find?

A. I found they was tight.

Q. O. K. Do I assume that you—I don't know what the technical term is. I know that the screw at the top and at the bottom holds the connections inside of the receptacle.

A. Right.

Q. You took those off and pulled this out; is that right?

A. I pulled it out a quarter of an inch so I could get a screwdriver on the screw.

Q. Right. And then you checked the binding head screw?

A. Right.

42

Q. O. K. Incidentally, please don't be nervous.

A. I am nervous.

Q. Well, you shouldn't be. I am not trying to assess blame or anything. I am not sure you have been—

A. Well, what I did, I didn't think I was doing anything—

Q. Mr. Vories, I don't think that you did anything wrong and I don't want you to be nervous. I am just trying to get some factual background, O. K.

And that was early in the trial? My recollection is that the slides were part of Mr. Aronstein's—

A. Right.

Q. —testimony?

A. Yes, uh-huh.

Q. O. K. And when you then found these things, whatever you found, did you then mention this to any of the jurors?

A. Well, I can remember when we went upstairs with a break or something—I don't know why I come up—I said, "Well, I had aluminum in my house and I had checked a couple of outlets and I found my terminals to be tight," and that's the last time—first time and last time it was ever said.

Q. O. K. Do you remember to how many jurors you mentioned this?

A. It's like—I really don't know. If somebody was within earshot of what I said, I guess they heard it. Except for what I said, but I didn't elaborate. I didn't tell them I was checking the outlets for the safety of my family, which I did do.

Q. Right.

A. I didn't think it had no bearing on the case whatsoever.

Q. O. K. Mr. Vories, let me tell you something. The second day of this trial I went downstairs and checked my wiring too. I didn't check with a binding head screw, but I found out that my wiring was copper.

You said that you mentioned this once. This was early in the trial?

A. Early in the trial.

Q. O. K. And it was not mentioned thereafter; is that right?

A. It was never mentioned again.

Q. And it was not a subject of any discussion that you can recall?

A. Nothing at all.

Q. All right. Mr. Vories, this is a pamphlet entitled Reconstruction of a Tragedy.

A. Uh-huh.

Q. Do you remember seeing this in the jury room?

A. I remember seeing it but I never got to look at it. The only thing maybe I was looking at, they was saying how pretty the fountain was. That's the only thing I seen. I looked over his shoulder and saw the fountain. I never did get to read nothing in the book.

Q. O. K. And once again, Mr. Vories, please don't be upset or nervous. It just doesn't warrant that.

Let me tell you, you are not required to talk to the press. If you want to, you may, but you don't have to.

A. I won't.

Q. They have no right to interrogate you and, above all, no lawyer may question you without my permission and I am not about to give that permission.

It's nice to see you again.

A. Yeah.

Q. I think that the jury was a good jury and, frankly, I enjoyed that case and I enjoyed my contact with you.
O. K., thank you very much.

A. Uh-huh.

(Juror excused.)

* * * * *

APPENDIX E
LIST OF PARENT, SUBSIDIARY AND
AFFILIATED CORPORATIONS

BRYANT ELECTRIC COMPANY

Ateliers de Constructions Electriques de Charleroi, S.A.

Bayou Cablevision Company

Bridgeport Community Antenna TV Co.

Cable TV General, Inc.

CDSW Ireland Limited

CMW Equipamentos, Ltda.

CMW Sistemas, Ltda.

Cemac Westinghouse Pty. Ltd.

China Industry Services Co., Ltd.

Compagnie des Dispositifs Semiconducteurs Westing-
house

El Paso Cablevision, Inc.

Electro-Fanal S.A.

Electrocontroles Villares, Ltda.

Eletromar Industria Eletrica Brasileira, S.A.

Eletromar Nordeste, S.A.

Ercole Marelli & Company, S.p.A.

Filmation Associates

Focus Cable of Oakland, Inc.

Galileo Argentina C.I.S.A.

Galileo Uruguay, S.A.

Grosse Point Cable, Inc.

Group W Cable of Burnsville/Egan, Inc.

Group W Cable of Lorain County, Inc.

Group W Cable of North Central Chicago, Inc.

Group W Cable of North West Chicago, Inc.

Group W Cable of St. Paul, Inc.

IEM S.A.

BRYANT ELECTRIC COMPANY (Cont.)

Industrias Electronicas

Industry Services Company of Saudi Arabia, Ltd.

Kaiser-Teleprompter of Hawaii, Inc.

Living and Learning (Cambridge) Ltd.

Mecanica Pesada, S.A.

Metzenauer & Jung GmbH

Mitsubishi Nuclear Fuel Co., Ltd.

Motores Electricos de Juarez S.A. de C.V.

Ottermill Products Limited

Piedmont Cablevision, Inc.

Saw Mill River Cablevision, Inc.

Schneider, S.A.

Southwest Video Corp. (d/b/a Group W Cable)

Teleprompter Cable Services, Inc.

Telecom Cablevision, Inc.

Teleprompter of Avon Lake, Inc.

**Teleprompter of Columbia Heights/Hilltop, Inc. (d/b/a
Group W Cable)**

Teleprompter of Denver, Inc.

Teleprompter of Kentucky, Inc.

Teleprompter of Milwaukee, Inc.

Teleprompter of Sacramento, Inc.

**Teleprompter of St. Bernard, Inc. (d/b/a Group W
Cable)**

Teleprompter of St. Paul, Inc.

Teleprompter of Sheffield Lake

Teleprompter of Worcester, Inc.

Transformadores de Distribucion Trade, S.A.

Transformadores TPL S.A.

Tyree Industries Limited

Tyree-Power Construction Limited

Vektron S.A.

BRYANT ELECTRIC COMPANY (Cont'd.)

Westinghouse Asia Controls Corp.
 Westinghouse Canada Inc.
 Westinghouse Electric-MK Limited
 Westinghouse Electric Supply Company of Saudi Arabia
 Westinghouse Electro Metalurgicas C.A.
 Westinghouse (Jamaica) Ltd.
 Westinghouse Monitor A.B.
 Westinghouse Proyectos Electricos, S.A.
 Westinghouse, S.A.
 Wexico Systems and Services, Ltd.
 Westinghouse Electric Corporation
 Westinghouse Saudi Arabia Ltd.

SOUTHWIRE COMPANY

Richards Enterprises, Inc.
 Suramericana de Aleacisnes
 Laminadas, C.A.
 Yazaki-Southwire Kabushikikaisha
 National Southwire Aluminum Company

TRIANGLE PWC, INC.

Triangle Industries, Inc.
 Rowe International, Inc.
 Triangle Finance Company, Inc.
 TPCO, Inc.
 Rowe International of Canada, Ltd.
 AMI
 Rowe SA

REYNOLDS METALS COMPANY**Subsidiaries**

Aluminio Reynolds, S.A.
 Bushnell Plaza Condominium Association, Inc.
 Bushnell Plaza Development Corporation
 City Venture Corporation

REYNOLDS METALS COMPANY (Cont'd.)**Subsidiaries (Cont'd.)**

Compania Metallurgica Colombiana, S.A. "COMECOL"

Egyptian Aluminum Products Company

Eskimo Pie Corporation

Eskimo Pie Corporation of Canada, Limited

Gas Natural Colombiano, S.A.

Industria Navarra del Aluminio, S.A.

Industrias Lacteas del Yocoimo, S.A.

Industrias Metal—Mecanicas del Quindio S.A.

Lynx—Canada Explorations Limited

Mill Pond Development Corporation

Minas do Dragao Ltda.

Mineracao Rio do Norte S.A.

Mineracao Sao Jorge Ltda.

Mineradora de Bauxita Ltda.

Minerais de Aluminio Ltd.

Mitsubishi Aruminiumu Kabushiki Kaisha

Montaje de Plantas Montaplan, S.A.

New Eastwick Corporation

Nuova Fonderpress S.p.A.

Omnia Minerios Ltda.

Phillips—C.B.A. Conductors Limited

Presidential Development Corporation

Presidential Manor Corporation

Presidential Plaza Associates

Presidential Plaza Corporation

Presidential Plaza Investors

R. I. A.—Reynolds Aluminum Italia S.p.A.

Reciclajes Envalic, C.A.

Regency Joint Venture

Regency Joint Venture II

REYNOLDS METALS COMPANY (Cont'd.)

Reyean Research Limited—Societe de Recherches Reyean
 Limitee
 Reynolds Aluminio, Sociedad Anonima de Capital
 Variable
 Reynolds Aluminium France
 Reynolds Aluminiumwerke Gesellschaft mit beschränkter
 Haftung
 Reynolds Aluminium Company of Canada Ltd.—Societe
 d'Aluminium Reynolds (Canada) Limitee
 The Reynolds—Gilbane—Weybosset Joint Venture
 Reynolds Regency Corporation
 Reynolds Wheels S.p.A.
 Reywest Development Corporation
 S.L.I.M. Cisterna S.p.A.
 S.L.I.M.—Societa Lavorazioni Industriali Metalli S.p.A.
 Superenvases Envalie C.A.
 Union Industrial y Astilleros Barranquilla "UNIAL" S.A.
 Valesul Aluminio S.A.
 Volta Aluminium Company Limited
 Weybosset Hill Development Corporation
 Worsley Alumina Pty. Ltd.

Affiliates

Alpart Farms (Jamaica), Ltd.
 Alumina Partners of Jamaica
 Aluminio del Caroni, S.A.
 Aluminio Reynolds, Santo Domingo, S.A.
 Aluminium Oxid Stade Gesellschaft mit beschränkter
 Haftung
 Eastwick Joint Venture
 Eskimo Europ, S.a.r.l.

REYNOLDS METALS COMPANY (Cont'd.)**Expert Candy Ltd.—Le Bonbon Expert Ltee.****Hamburger Aluminium—Werk Gesellschaft mit
beschränkter Haftung****Jamaica Alumina Security Company, Ltd.****Jamaica Reynolds Bauxite Partners****LoMer Development Corporation****Madison Manor Associates****Manicouagan Power Company—La Compagnie
Hydroelectrique Manicouagan****Puerto de Hierro, Sociedad Anonima****Reynolds Aluminium (Thailand) Company, Limited****Reynolds Philippine Corporation****Robertshaw Controls Company****UMCO, S.A.³****Westeel International Ltd.****Partnerships and Joint Ventures****Bennett Manor Associates****Burrstone Associates****Bushnell Plaza Apartments****Cathedral Square Associates****Cathedral Square Associates II****Chace Investors Joint Venture****Crown Oak Associates of Penfield****Curtis Apartments Associates****Cypress Courts Associates, Ltd.****Eastwick Joint Venture II****Eastwick Joint Venture III****Eastwick Joint Venture IV****Midtown Associates****Mill Pond Towers Associates**

REYNOLDS METALS COMPANY (Cont'd.)

The National Housing Partnership
Oceanside Estates Associates, Ltd.
Rayburn Manor Associates
Regency West Associates
Titusville Manor Associates
Worsley Joint Venture

HATFIELD WIRE & CABLE COMPANY
Parent Company

C.C.X, Inc.

LEVITON MANUFACTURING CO.

Atteum Properties, Inc.
Deal Electric Corp.
Leviton Manufacturing of Canada, Ltd.
Wayne Realty Corp.
Electro Porcelain, Ltd.
J.E.S. Realty Co.
B.H.J. Trucking Co.
Kilvert Corp.
Thyrotek Corp.

GENERAL ELECTRIC COMPANY

Canadian G. E. Company Limited
General Electric de Mexico
Sadelmi—Cogepi Compagnin Generale
Progettazioli e Installazioni S.p.A.

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